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United States 1082  
**Circuit Court of Appeals**  
For the Ninth Circuit.

ISABELLE GARWOOD,

Plaintiff in Error,

vs.

JOSEPH SCHEIBER, MAURICE SCHEIBER and JOHN SCHEIBER,

Defendants in Error.

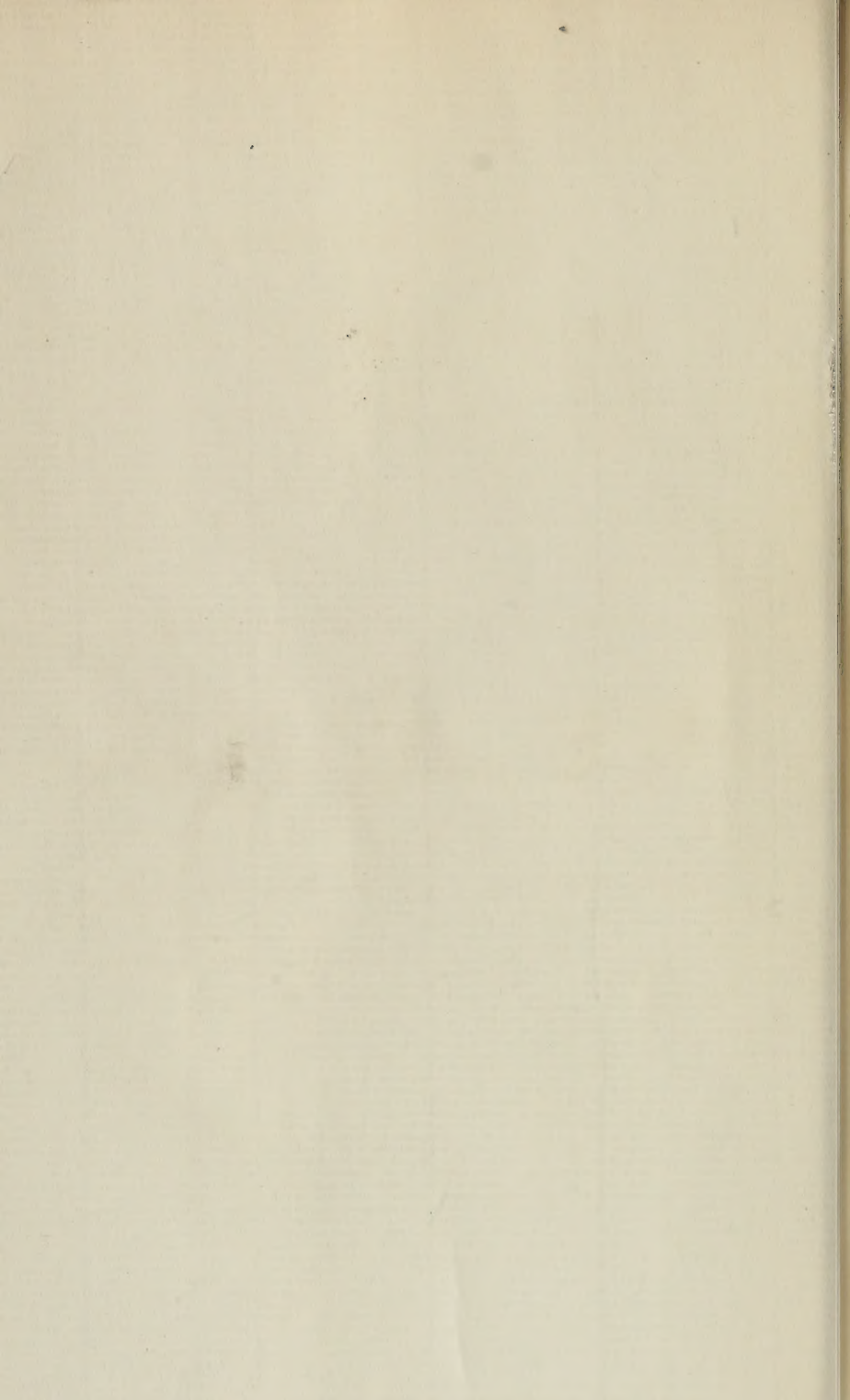
**Transcript of Record.**

Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

**Filed**

JAN 25 1917

**F. D. Monckton,**  
Clerk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States for the  
Northern District of California.*

No. —.

ISABELLE GARWOOD,

Plaintiff,

vs.

JOSEPH SCHEIBER and FRANCES SCHEIBER (His Wife), MORRIS SCHEIBER and EMMA SCHEIBER (His Wife), and JOHN SCHEIBER and ANNA SCHEIBER (His Wife),

Defendants.

**Complaint.**

To the Honorable Judges of the District Court of the United States for the Northern District of California:

Plaintiff above named alleges that her full name is Isabelle Garwood; and that she is an unmarried woman, and is a citizen of the State of New York, United States of America; and, for cause of action, against the above-named defendants, plaintiff further alleges:

I.

That defendants Joseph Scheiber and Morris Scheiber and John Scheiber are citizens and subjects of a foreign State,—are citizens and subjects of an European State, to wit, Switzerland.

II.

That during all the times herein mentioned, prior to the 1st day of November, 1911, the above-named defendants were the owners of and in the actual and peaceable possession of all of that certain land and premises and improvements thereon, situated

in the county of Sutter, State of California, and more particularly described as follows, to wit:

Beginning at a point on the left bank of the Feather River fifteen chains and eighty (15.80) links below the southwest corner of the so-called Nicolaus Allgier Tract; running thence down stream following the meanderings of said river to the point where the western boundary line of lot two (2) of the New Helvetia Rancho intersects said river; thence south fifteen ( $15^{\circ}$ ) degrees and eight (8') minutes east, following said boundary line fourteen chains and forty-four (14.44) links; thence south sixty-four ( $64^{\circ}$ ) degrees east six chains and forty-four (6.44) links; thence south seventy-eight ( $78^{\circ}$ ) degrees and thirty minutes (30') east twenty-four chains and fourteen (24.14) links; thence south fourteen ( $14^{\circ}$ ) degrees and thirty (30') minutes west, fifteen chains and ninety (15.90) links; [1\*] thence south forty degrees ( $40^{\circ}$ ) east forty-eight chains and seventy (48.70) links; thence east two chains and forty-five (2.45) links; thence north fifty ( $50^{\circ}$ ) degrees east thirty-eight chains and eleven (38.11) links to a point on the extended rear line of said Nicolaus Allgier Tract, fifteen chains and eight (15.08) links distant from the south-east corner of the same; and thence north thirty-nine ( $39^{\circ}$ ) degrees and thirty-six (36') minutes west eighty (80) chains to the

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\*Page-number appearing at foot of page of original certified Transcript of Record.

place of beginning. Also the northeasterly quarter of Section twenty-four (24) in Township Twelve (12) North, Range Three (3) East, Mount Diablo Base and Meridian, the whole containing six hundred (600) acres of land, more or less, and being the whole of the so-called Nicolaus Allgier Ranch, situated below the town of Nicolaus, bounded on the east side by the farms of P. Straugh and Phil R. Drescher, on the north by the Redfield farm, and on the west by the Feather River, and on the south by the farms of Claus Peters and John Schwall, and being the same land described in a deed recorded in the office of the County Recorder of Sutter County, California, in Book 46 of Deeds, at page 23, Sutter County Records.

### III.

That for some months prior to said 1st day of November, 1911, the said above-named defendants had been and were desirous of selling said hereinbefore-described land, and had, as plaintiff is informed and believes, entered into an agreement with certain agents who were to sell said land, and to be paid a commission therefor; that said agents with whom defendants contracted were one Harry K. Brown, and also one U. L. Dike and one A. L. Crane; the said U. L. Dike and A. L. Crane were at that time doing business under the firm name and style of California Colonization Company, Incorporated.

### IV.

That some few days prior to the 20th day of September, 1911, plaintiff went to the office of said real

estate concern, California Colonization Company, in the city of Sacramento, for the purpose of investigating the possibility of purchasing some land; that at said office she met the said above-named members of said firm and company and they told her of some land holdings in the Sacramento Valley, which they had for sale, and plaintiff then and there informed said members of said real estate firm and company that she had no experience in reference to land of any kind, and that she would not trust her own judgment in the [2] purchase of any real estate; that she had a friend, Dr. F. I. Ramos, who would arrive in Sacramento within a few days, and that she placed implicit confidence in his judgment, and that he would have to be present before she would seriously consider the matter of purchasing property; that on or about the 19th day of September, 1911, the said Dr. F. I. Ramos arrived in Sacramento; that said Dr. F. I. Ramos and plaintiff were at that time engaged to be married; that the said F. I. Ramos was a man fifty years of age and of extensive education and experience, and plaintiff placed complete confidence and reliance upon his judgment and suggestions in matters of a business character.

That plaintiff, upon the arrival of the said Dr. F. I. Ramos told him that she was thinking of investing some five or six thousand dollars in land in the Sacramento Valley and requested him to go with her to the office of said California Colonization Company for the purpose of seeing what they had for sale; that upon the day following the arrival of said F. I.

Ramos in Sacramento, that is, on or about the 20th day of September, 1911, plaintiff accompanied by said F. I. Ramos, went to the office of said agents of said defendants, said U. L. Dike and said A. L. Crane, doing business under the name and style of California Colonization Company, and introduced the said F. I. Ramos to said U. L. Dike and A. L. Crane, and told them that he was her friend and adviser, and that she relied upon his judgment; that very shortly after being introduced to said F. I. Ramos, said agents of defendants, said U. L. Dike and said A. L. Crane had a private interview with said F. I. Ramos and offered to said Ramos a valuable consideration to put in his own private pocket if he would use the trust and confidence imposed in him by plaintiff to the purpose of inducing plaintiff to buy certain real estate which they wanted to sell; that said F. I. Ramos was unscrupulous and dishonest, although that fact was not at that time known to plaintiff; and the said F. I. Ramos and the said agents, U. L. Dike and A. L. Crane, thereupon entered into a secret understanding unknown to plaintiff to the [3] effect that said Ramos was to receive fifteen hundred dollars in the event that he should persuade plaintiff to buy said hereinbefore mentioned and described property.

#### V.

That upon the 21st day of September, 1911, plaintiff was prevailed upon by said agents to visit said property, and upon said day she went with said U. L. Dike and said F. I. Ramos in an automobile to the said property; that this visit and one subsequent

visit, on September 30th, 1911, were the only times and occasions when plaintiff saw said property before purchasing the same, and upon each of said two occasions when visiting said property plaintiff was suffering from a sprained ankle; and said sprained ankle was sore and painful to such a degree that it was impossible for plaintiff to walk more than a few feet at a time, and such injury made it impossible for plaintiff to walk over or carefully examine said land; that plaintiff, while at said ranch, inquired of said defendants as to the boundaries of said property and asked them to tell her where said ranch extended to, and Morris Scheiber pointed to the levee on the east bank of the Feather River, and called plaintiff's attention to the same, and stated that the western boundary of said ranch ran along said levee northward to a point near a white house, and from there eastward along a certain fence which he indicated to a point beyond a grove of oak trees, which he also indicated, and from there in a general southerly direction; and thence at right angles back in a westerly direction to the levee on the river bank; that the expanse which he indicated and showed to plaintiff was clear and level land, and said defendant, Morris Scheiber then and there represented to plaintiff that said six hundred acres were all clear, level land identically the same as that directly about them where they stood; that said defendants and defendants' agents, in dealing with plaintiff and enticing plaintiff to purchase said land at all times represented to plaintiff that said place contained six hundred acres of clear, arable land, and represented that two hun-

dred and fifty of said acres were under [4] cultivation and growing alfalfa, and said agents informed, advised and represented to plaintiff that said ranch consisted of six hundred acres of the finest alfalfa land in the State of California, and that she could buy the same for one hundred and twenty-five dollars per acre; that there were six hundred acres, which would be an even \$75,000, all of which plaintiff then and there and at all times believed; that plaintiff herein is and was at all times herein mentioned completely ignorant and absolutely inexperienced as to land or real estate, and at the time of said purchase knew absolutely nothing of real estate values and knew nothing of farming, and is and was without business training or experience, and plaintiff in purchasing said land relied solely upon the counsel, statements and advice of said defendants and defendants' agents, U. L. Dike, A. L. Crane, F. I. Ramos, and also one Clinton White; that at the time of said negotiations she had never had any experience whatever with land of any kind, and had never purchased any real estate, and when she was shown the said land by said defendants, and when said defendants pointed out what they told her were boundaries of said land, plaintiff was unable to judge of the quantity of land, or of the number of acres which were within said boundaries as they were indicated to her by said defendant Morris Scheiber.

## VI.

That plaintiff regarded defendants and their said agents, U. L. Dike, A. L. Crane, F. I. Ramson and said Clinton White as honorable and honest men,

and she had no reason to mistrust them or misbelieve their statements in reference to said land, and she then and there and at all times believed that said six hundred acres were all clear and level and were contained within the boundaries as pointed out by said Morris Scheiber, and that there were on said level expanse which said Morris Scheiber had pointed out to her six hundred acres as they then and there claimed, and that, as the area pointed out to her appeared, it was all level, clear and ready to cultivate; that at said time all of said defendants and defendants' [5] agents were all aware of plaintiff's ignorance and inexperience in reference to real estate, and at all times were well aware of the fact that plaintiff was laboring under a misapprehension as to the character and condition of said land, and defendants knew that she was ignorant of the fact that one hundred and fifty of said six hundred acres were outside the levee and were unfit and unadapted to the raising of alfalfa, and that said one hundred and fifty acres lying outside the levee were practically worthless.

## VII.

That while said negotiations herein mentioned were pending, plaintiff told the said U. L. Dike and said A. L. Crane that she was a stranger in Sacramento and that she felt that she should have the advice of a capable lawyer to look after her side of the deal, to the end that there might not be any slip in technical or legal matters, and said U. L. Dike and A. L. Crane advised plaintiff to go to the said Clinton White, hereinbefore mentioned, and stated to

plaintiff that said Clinton White was the ablest lawyer in Sacramento; that plaintiff went to said Clinton White and employed his service to represent her in the matter of said deal, and said Clinton White took up for plaintiff the matter of said deal, and plaintiff then and there assumed and believed that the said Clinton White was in her employ and was acting as her attorney and for her best interests; that before she actually purchased said property, to wit, on or about the 25th day of September, 1911, plaintiff signed an agreement to purchase said property, and in said agreement to purchase said land was represented as "six hundred acres more or less"; that plaintiff asked the said Clinton White what the words "more or less" meant and told the said Clinton White that it was her understanding that she was buying six hundred acres of the finest alfalfa land in the State of California, and in reply to this the said Clinton White stated to and told plaintiff that that was what the agreement meant, and that the words "more or less" were simply a law term;

That after said deal was consummated plaintiff went to said [6] Clinton White, and asked what his charges were, and said Clinton White dismissed the subject with some evasive reply, and said: "Oh, your bill will come along in good time" and upon information and belief plaintiff alleges that said Clinton White was paid money by said defendants and their said agents for helping them to consummate said sale, and for furthering their ends and interests by quieting any fears or objections of plaintiff in the matter of said transaction and for encouraging her

to purchase said property; and that the said Clinton White did this while pretending to plaintiff to be her lawyer and while pretending to plaintiff to be looking out for her interests, and while in truth and in fact he was in the employ and was actually paid by defendants to look out for their interests as against the interests of plaintiff, and that he was in truth and in fact the lawyer for the vendors in said transaction, and looked after their interests and did not look after the interests of plaintiff.

### VIII.

That said F. I. Ramos, in pursuance of the said underhanded, dishonest and treacherous agreement which he, without the knowledge of plaintiff, had entered into with said U. L. Dike and A. L. Crane, influenced, advised, and persuaded plaintiff to buy the said property, and told plaintiff that she would within a short time be able to make a great deal of money out of said property by cutting up said six hundred acres of land and selling it as small farms; and plaintiff then and there believed the said F. I. Ramos; and upon the judgment and advice of the said F. I. Ramos, and upon the statements and representations of said defendants and said U. L. Dike and said A. L. Crane in reference to the quantity and condition of said land, and upon the advice and counsel of said Clinton White in respect to the land, plaintiff purchased said hereinabove described land from the herein-named defendants; that plaintiff bought said land and premises and defendants sold her the same upon the theory and basis that she was getting six hundred acres of first-class, clear, level,

arable land, [7] all of which was adapted to the raising of alfalfa, and that she was paying for the same at the rate of one hundred and twenty-five dollars per acre; and upon said basis and theory plaintiff paid to defendants the sum and price of seventy-five thousand dollars.

### IX.

That in pursuance of his said underhanded, secret and dishonest agreement with said U. L. Dike and said A. L. Crane, said F. I. Ramos used the trust and confidence imposed in him by plaintiff to the end of persuading plaintiff to purchase said property as hereinbefore set forth, and for and as a consideration for such abuse and betrayal of plaintiff's confidence he was actually paid and actually received from defendants and defendants' agents the sum of fifteen hundred dollars, which he then and there put to his own private account and uses and all the said parties to said transaction kept the same secret and away from the knowledge of plaintiff, and plaintiff never knew of nor had any knowledge of said transaction or the payment of said or any money to said F. I. Ramos until a time long afterward, when the said U. L. Dike and the said A. L. Crane and the said Harry K. Brown commenced to quarrel among themselves over their respective shares in the commission for the sale of said property, at which time the said Harry K. Brown came to plaintiff and advised her that said F. I. Ramos had been paid fifteen hundred dollars as a consideration for his having influenced her to purchase said property.

## X.

That all of the said representations of the said defendants and their agents hereinbefore named, in reference to said land and in reference to the character and condition thereof were false, fraudulent and untrue, and were known by defendants to be false, fraudulent and untrue at the time they were made, and the said false, fraudulent and untrue statements and representations were made by defendants with the single and sole purpose and intent of cheating, tricking and defrauding plaintiff, and to entice her to purchase the hereinbefore [8] mentioned and described land; that said six hundred acres of land is in fact not all level and clear, and is not all arable land, and is not all adapted to the growth or to the raising of alfalfa, as the said defendants and their said agents represented, but, on the contrary, only about four hundred and fifty acres out of said six hundred acres is as represented; that one hundred and fifty acres out of said six hundred acres lies outside of the levee, and said one hundred and fifty acres of land lying outside of the levee is practically worthless; that seventy-seven acres of that portion which lies outside of the levee is inundated and submerged land and is covered by the waters of the Feather River and is fit for no purpose whatever; that seventy-seven acres of that portion which lies outside of the levee is not worth more than ten dollars per acre; that since the time of the sale of said land to plaintiff there has been constructed a new levee on the outside and to the westward of the old levee, and said new levee has reclaimed about fifty-

seven acres lying between the said two levees, but said fifty-seven acres of land is so uneven and so covered with holes and hills and so densely covered with jungle, brush and trees that by the most conservative estimates it would cost plaintiff considerably more than one hundred and fifty dollars per acre to put said fifty-seven acres in a condition ready for cultivation.

## XI.

That by reason of said false, fraudulent and untrue representations upon the part of said defendants and their agents, A. L. Crane and U. L. Dike, and by reason of the fraud, conspiracy, duplicity, and double dealing of the said F. I. Ramos, who as is herein set forth, was made the agent of defendants while he occupied a fiduciary relationship with plaintiff herein, and by reason of the duplicity and double dealing upon the part of the said Clinton White, who was likewise made the agent of defendants while occupying a fiduciary relationship [9] with said plaintiff herein, plaintiff has been defrauded and damaged in the sum of eighteen thousand seven hundred and fifty dollars (\$18,750), to wit, plaintiff, by reason of the facts herein alleged, was induced to pay one hundred and twenty-five dollars per acre for one hundred and fifty acres of land (the said land on the outside of the said levee) which she did not bargain for and which is perfectly worthless for the purpose for which plaintiff was buying said land, and which said one hundred and fifty acres is of no value whatever.

WHEREFORE plaintiff prays the judgment of the Court as follows, to wit: That she be given judgment against said defendants in said sum of eighteen thousand seven hundred and fifty dollars, together with interest thereon from the 1st day of November, 1911, and for her costs and disbursements in this action, and for general relief.

Dated Sept. 30th, 1913.

LLOYD MACOMBER,  
Attorney for Plaintiff. [10]

State of California,  
City and County of San Francisco,—ss.

Isabelle Garwood, being first duly sworn, deposes and says: That she is the plaintiff mentioned in the within and foregoing complaint; that she has read said complaint, and knows the contents thereof, and that the same is true of her own knowledge, save as to those matters which are therein stated on her information and belief, and that as to those matters she believes it to be true.

ISABELLE GARWOOD.

Subscribed and sworn to before me this 30th day of September, 1913.

[Seal] J. D. BROWN,  
Notary Public in and for the City and County of San  
Francisco, State of California.

[Endorsed]: Filed Oct. 11, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

[Title of Court and Cause.]

**Demurrer.**

The defendants, and each of them appear herein and demur to the complaint of plaintiff on file in this cause and specify their objections to said complaint as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action against these defendants, or against any thereof.

II.

That the Court has no jurisdiction of the persons of defendants or the subject of the action.

III.

That the complaint is ambiguous in that it does not show wherein plaintiff was damaged by the acts of defendants complained of in said complaint, or that she was damaged by such acts in any manner or for any sum whatever.

IV.

That said complaint is uncertain in the following particular:

Plaintiff alleges in her complaint that in her decision to purchase the land described in said complaint and for the sum therein expressed, she was guided by and relied upon the advice, knowledge and experience of F. I. Ramos, to whom she was engaged [12] to be married, but it nowhere appears in said complaint, except by inference, that said F. I. Ramos ever acted as the agent of defendants, in mak-

ing the sale of said land, or that any of the alleged acts of said F. I. Ramos, in connection with such sale of the property described in the complaint, were known to these defendants or any of them, or said F. I. Ramos, was authorized or empowered to act for said defendants or either thereof, in any matter relating to the sale of said land.

V.

That for the reasons stated in paragraph four of this demurrer said complaint is ambiguous.

VI.

That for the reasons stated in paragraph four of this demurrer, said complaint is unintelligible.

ARTHUR E. MILLER and  
A. H. HEWITT,

Attorneys for Defendants.

**Certificate of Counsel.**

The undersigned, counsel for defendants, certify that the above and foregoing demurrer is not filed for delay, and in the opinion of the undersigned, the same is well taken by point of law.

ARTHUR E. MILLER and  
A. H. HEWITT,

Attorneys for Defendants.

Service of the within demurrer by copy admitted this 22d day of November, 1913.

LLOYD MACOMBER,  
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 22d, 1913. W. B. Mal-  
ing, Clerk. [13]

At a stated term, to wit, the November term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 15th day of December in the year of our Lord, one thousand nine hundred and thirteen. PRESENT: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,701.

ISABELLE GARWOOD,

vs.

JOSEPH SCHEIBER et al.

**Order Overruling Demurrer.**

Defendants' demurrer having been called on three successive law and motion calendars and no one having answered said calls it was ordered that said demurrer be and the same is hereby overruled for want of prosecution. [14]

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[Title of Court and Cause.]

**Answer.**

To the Judges of the District Court of the United States of America, Northern District of California, Second Division.

Come now the defendants in the above-entitled cause, and answering the bill of complaint of plaintiff herein for grounds of answer admit, deny and allege as follows, to wit:

Defendants are informed and believe and upon such information and belief they allege, that the plaintiff in this cause is, and for a period of over two years has been a resident and citizen of the State of California, and they therefore deny that said plaintiff is or that she has been for a period of over two years immediately preceding the commencement of this cause a resident or citizen of the State of New York.

I.

These defendants deny the allegations contained in paragraph one of plaintiff's bill of complaint to the effect that Morris Scheiber and John Scheiber are citizens and subjects of Switzerland, and they allege that the said defendants, John [15] Scheiber and Morris Scheiber, have renounced all allegiance to every foreign State, Prince, Potentate and sovereignty, and that they and each of them did, before the filing of this complaint herein, in the office of and before the county clerk of the county of Sutter, State of California, duly declare their intention to become citizens of the United States of America, the said Morris Scheiber making such declaration on the 25th day of March, 1912, and the said John Scheiber making such declaration on the 2d day of January, 1913.

These defendants further allege that said John Scheiber, Morris Scheiber and Joseph Scheiber have been continuously, residents of the State of California for a period of over twenty years, and that the defendants, Frances Scheiber, Emma Scheiber

and Anna Scheiber now are and always have been citizens and residents of said State.

## II.

These defendants admit the allegations contained in paragraph two of said complaint, and they allege that the land referred to and described in said paragraph is more fully and definitely described from surveys made of said land since the first day of November, 1911, and before the commencement of this cause, as follows, to wit:

Beginning at the section corner common to sections eighteen and nineteen, township twelve north, range four east, and section twenty-four, township twelve north, range three east, Mount Diablo Base and Meridian, Sutter County, Cal., and running thence along the east boundary line of lot number two of the New Helvetia Rancho and which line is also the western boundary line of section eighteen, township twelve north, range four east, Mount Diablo Base and Meridian, north  $00^{\circ} 11'$  west, one thousand eight hundred and twenty and seventy hundredths feet; [16] thence south  $49^{\circ} 45'$  west, three hundred seventeen and forty-seven hundredths feet; thence north  $39^{\circ} 50'$  west, five thousand six hundred seventy-four and fifty-nine hundredths feet along the southerly boundary line of the Redfield Farm, so called, to a point on the easterly bank of the Feather River; thence following the meanderings of the said Feather River, south  $32^{\circ} 19'$  west, seven hundred seventy-six and seventy-nine hundredths feet; thence south  $45^{\circ} 49'$  west, one thousand two hundred twen-

ty-one feet; thence south  $79^{\circ} 49'$  west three hundred ninety-six feet; thence north  $40^{\circ} 26'$  west, nine hundred ninety feet to a point on the west boundary line of lot number two of the New Helvetia Rancho; thence continuing along the southerly or easterly bank of the aforesaid Feather River, north  $51^{\circ} 11'$  west, seven hundred forty-five and eighty hundredths feet; thence north  $56^{\circ} 11'$  west three hundred ninety-six feet; thence north  $70^{\circ} 11'$  west, three hundred ninety-six feet; thence south  $89^{\circ} 49'$  west, two hundred thirty-one feet; thence south  $86^{\circ} 19'$  west, three hundred eighty-nine and forty hundredths feet; thence south  $89^{\circ} 49'$  west, three hundred twenty-three and forty hundredths feet; thence south  $65^{\circ} 19'$  west, two hundred sixty-four feet; thence south  $48^{\circ} 19'$  west, six hundred forty-three and seventy-seven hundredths feet to a point, and which point marks the intersection of an old fence line with the southerly or easterly bank of the Feather River; thence along said fence line south  $63^{\circ} 43\frac{1}{2}'$  east, three thousand two hundred and ninety and seven hundredths feet to a point on the west boundary line of lot number two of the New Helvetia Rancho; thence along said west boundary line of lot number two of the New Helvetia Rancho south  $00^{\circ} 11'$  east, one hundred four and fifty hundredths feet to a point; thence south  $79^{\circ} 26'$  east, two thousand and eighty-seven and seventy-four hundredths feet; thence south  $14^{\circ} 24'$  west, one thousand and sixty-one and eighty-five hundredths feet; thence [17] south  $40^{\circ} 00'$  east, three thousand one hundred eighty-seven and forty-

eight hundredths feet; thence north  $89^{\circ} 49'$  east, two thousand three hundred sixty-four and seventy hundredths feet to the point of beginning, and containing four hundred and forty-eight and forty-two hundredths (448.42) acres.

Also the north east one quarter of section twenty-four, township twelve north, range three east, Mount Diablo Base and Meridian, Sutter County, California.

The land and premises above described being the same lands and premises, but more definitely described, conveyed to Joseph Scheiber, Albin Scheiber, Morris Scheiber and John Scheiber, by the Pacific Mutual Insurance Company of California, a corporation, by deed dated December 15, 1908, and recorded in the office of the recorder of the county of Sutter, State of California, on January 2d, 1909, in Book 40 of Deeds, page 484, and comprising the whole of the so called Nicolaus Allgier Ranch, situated below the town of Nicolaus, in said Sutter County and including lot four of the southwest quarter of section eleven and lot five of the southeast quarter of section eleven and lots four and twenty-three of the northeast quarter of section fourteen, in township twelve north, range three east, Mount Diablo Meridian.

### III.

These defendants admit that for some time prior to November 1st, 1911, they were desirous of selling the land described in paragraph two of this answer, and they admit that they entered into an agreement with the California Colonization Company, a corporation, for the sale of said land, and that they agreed

to pay said corporation a certain commission for effecting such sale upon terms specified in such agreement, but they deny that they ever entered in any agreement or contract with Harry K. Brown, U. L. Dike and A. L. Crane, or either thereof, for the [18] sale of said land, and they deny further that said Harry K. Brown, U. L. Dike and A. L. Crane, or either thereof ever were the agents of these defendants, or either thereof, in the sale of said land, in any manner or at all, or that they, or either thereof ever agreed with said persons or either thereof to pay them or either of them a commission or any compensation for affecting a sale of said lands.

#### IV.

These defendants and each of them deny that U. L. Dike, and A. L. Crane or either of them ever were, at any time, or for any purpose the agents of these defendants or any thereof. These defendants, of course, have no knowledge except that acquired upon information as to what, if anything may have been said in the private interview referred to in paragraph four of plaintiff's said bill of complaint, and alleged therein to have taken place between U. L. Dike, and A. L. Crane and said F. I. Ramos, except such knowledge as they have acquired on inquiry and information, and basing their denials upon such information and their belief in the correctness thereof, they deny that said U. L. Dike and said A. L. Crane or either thereof, ever offered to said F. I. Ramos, a valuable or any consideration, to put in his own private pocket or to use for his own personal profit in consideration of his using the trust and confidence

imposed in him by plaintiff to the purpose of inducing plaintiff to buy certain real estate which they wished to sell; and they and each of them deny that said U. L. Dike and A. L. Crane, or either of them, entered into a secret or any understanding, known or unknown, to plaintiff to the effect that said Ramos was to receive the sum of fifteen hundred dollars or any sum whatever, in the event that he should persuade plaintiff to buy the property hereinbefore described, or any other property. [19]

## V.

These defendants deny that on or about the 21st day of September, 1911, or on any other date or at all, she was prevailed upon by an agent or agents of defendants, or either of them, to visit the property described in the complaint; deny that the only times plaintiff saw said property before purchasing the same, were on September 21st, and September 30th, 1911; deny that on said dates or on either thereof, said plaintiff was suffering from a sprained ankle to such an extent or to such a degree that it was impossible for her to walk more than a few feet at a time, or that such injury made it impossible for plaintiff to walk over the premises, or to examine the same; deny that the defendant, Morris Scheiber or any other defendant pointed to the levee on the east bank of the Feather River, or that the attention of plaintiff was called to the same by defendants or any other person as being or forming the western boundary of the ranch of defendants; deny that said defendants or either of them, or any other person, stated to plaintiff that said levee constituted the western

boundary, or any boundary of said property; deny that the expanse shown to the plaintiff, or indicated to her was clear and level land; deny that the defendant, Morris Scheiber, then and there represented, or ever represented to plaintiff that said ranch contained six hundred acres of land or that said six hundred acres were all clear and level land or clear or level land; deny that said defendant or any defendant, or any other person made any comparisons or representations as to the quality or quantity of said land or any part or portion of the same; deny that defendants or either thereof, or any agents of defendants or either thereof, in dealing with plaintiff, or otherwise, at all times, or any time, or on any occasion whatever, represented to plaintiff that said place contained six hundred acres of clear, arable land or clear or arable [20] land; deny that said defendants or either thereof, or any agent or agents of defendants or either thereof, ever enticed plaintiff to purchase said land; deny that said defendants or either thereof, or that any agent of defendants or either thereof, ever represented to plaintiff that two hundred and fifty acres of said land were under cultivation and growing alfalfa; deny that said defendants or either thereof, or that any agent of defendants or either thereof, advised and represented, or advised or represented to plaintiff that said ranch consisted of six hundred acres of the finest alfalfa land in the State of California, and that she could or that she could buy the same for one hundred and twenty-five dollars per acre; deny that a price by the acre was ever made to the plaintiff, either by defend-

ants or by any agent of defendants; deny that plaintiff is or that she was at the times mentioned in her complaint ignorant and inexperienced or ignorant or inexperienced as to land; deny that she knew nothing of real estate values; denies that she is now or was at the times mentioned in her complaint without business training or experience; deny that plaintiff in purchasing said land relied solely or relied at all upon the counsel, statements, and advise, or either thereof, of said defendants or either thereof, or any agents or agent of defendants or either thereof; deny that said F. I. Ramos and Clinton White, or either of them ever were the agents of defendants or either thereof, at any time, or for any purpose; defendants deny that the defendant, Morris Scheiber, ever met or saw plaintiff on the ranch in question prior to the date of her purchase of the same.

## VI.

Defendants deny that plaintiff ever believed, or that she ever thought that six hundred acres of the land described in her complaint were all clear and level land, or that said land or any part thereof, was contained within the boundaries pointed out to [21] her by said defendant, Morris Scheiber; deny that it appeared to plaintiff that the tract contained six hundred acres of clear and level land, ready for cultivation; defendants deny that at the times mentioned in plaintiff's bill of complaint they or any of them, or any agent or agents of said defendants, or any of them, were aware of the fact, that plaintiff was laboring under a misapprehension as to the character

and conditions or character or condition of said land, or any part thereof; deny that they or any of them, or that any agents knew that plaintiff was ignorant of the fact, that one hundred and fifty acres of said six hundred acres were outside the levee, and were unfit and unadapted to raising or unfit or unadapted to raising alfalfa, or that said one hundred and fifty acres lying outside the levee was practically worthless.

These defendants allege that said plaintiff, at no time, has labored under a misapprehension concerning the quantity or quality of said land, or any portion thereof, or the condition or character thereof, or the location of the same.

Defendants allege that prior to the purchase of said land by plaintiff, said plaintiff and her agent and betrothed, F. I. Ramos, went upon said land on three different occasions, for the express purpose of investigating its character, extent, condition and location, and that on each of said occasions they and each of them, made a thorough investigation of said land and the location of the same; that the exterior boundaries of said tract were accurately pointed out to them and each of them, and the physical location of said land is such that it would be impossible for plaintiff to have been mislead or deceived as to the extent, condition or character of said land or any part thereof.

## VII.

On information and belief defendants also deny that plaintiff [22] went to one, Clinton White, a lawyer of Sacramento, and employed him or his services to represent her in the matter of the deal re-

ferred to in her said bill of complaint; deny that said Clinton White took up for plaintiff the matter of said deal; deny that plaintiff assumed and believed or assumed or believed that said Clinton White was in her employ or that he was acting as her attorney; deny that plaintiff ever asked said Clinton White, what the words "more or less," referred to in the agreement which plaintiff alleges she executed on or about the 25th day of September, 1911, meant, or that she told said Clinton White that it was her understanding that she was buying six hundred acres of the finest alfalfa land in the State of California; deny that she ever told said Clinton White what her understandings were concerning the purchase of said lands, or that the said Clinton White knew anything about her understandings concerning the same or that he ever knew anything about the character or condition of said land, or that he was ever asked advice concerning its character or condition; deny that he ever explained to or told plaintiff that the agreement referred to in paragraph six of her bill of complaint meant that she was purchasing six hundred acres of fine alfalfa land or six hundred acres of any kind of land, or that he ever told plaintiff or explained to her that the words, "more or less" were simply law terms, or that he explained said words to her in any manner or at all;

On information and belief defendants also deny that plaintiff, after the said deal was consummated, or at any other time, went to the office of said Clinton White and asked him what his charges were, or that she ever spoke to said Clinton White concerning his

*his* charges; deny that said Clinton White, in reply to questions asked of him by plaintiff, or otherwise, ever told plaintiff that her bill would come along in good time, or that he ever made any evasive reply to her concerning said matter or any matter. [23]

These defendants deny that the said Clinton White was paid money or any other consideration by them or any agent of them, or either of them, for helping *any* any agent or agents of defendants to consummate said sale or any sale; deny that any money or other consideration was ever paid to said Clinton White by defendants or by any agent or agents of defendants or either of them, for furthering the ends and interests or ends or interests of defendants, or any agent or agents of defendants, by quieting any fears or objections of plaintiff in the matter of said transaction and for encouraging or for encouraging her to purchase said property; deny that said Clinton White ever, in any manner, encouraged plaintiff in purchasing said property or that he ever asked for, gave any advice concerning the same.

On information and belief these defendants deny that said Clinton White did the things alleged to have been done by him, mentioned in said paragraph six of plaintiff's bill of complaint, while pretending to plaintiff to be her lawyer and while or while pretending to her to be looking out for her interests, and they deny that the said Clinton White ever pretended to plaintiff to be or that he ever was her attorney in said matter or that he was ever asked to represent her in said transactions; deny that said Clinton White was paid to look out for the interests of defendants in said

transaction against the interests of plaintiff therein.

### VIII.

These defendants deny that said F. I. Ramos, in pursuance of any underhanded dishonest and treacherous agreement, or in pursuance of any underhanded, or dishonest or treacherous agreement, which he, with or without, the knowledge of plaintiff had entered, into with U. L. Dike and A. L. Crane, influenced, advised and persuaded plaintiff to buy the property described in complaint; deny that plaintiff purchased said land from defendants, [24] upon the statements and representations, or statements or representations of said defendants, and said U. L. Dyke and said A. L. Crane, or either or any of them, in reference to the quantity and condition or quantity or condition of said land, or that said plaintiff purchased said land upon the advice and counsel or advice or counsel of said Clinton White, in respect to said land, or that she purchased said land upon any statements, representations, counsel or advice of any of said persons; deny that plaintiff bought said land and premises, or either thereof, or that defendants sold her the same upon the theory and basis or theory or basis that she was getting six hundred acres of first class, clear, level, arable land, or six hundred acres of first-class, or clear, or level or arable land, or upon the basis or theory that all of said land was adapted to the raising of alfalfa, or upon the basis that she was paying for the same at the rate of one hundred and twenty-five dollars per acre, or that she purchased said land upon all or any of such theories or basis; deny that upon such basis or theory or all or any thereof, plaintiff

paid to defendants the sum of seventy-five thousand dollars.

### IX.

Deny that in pursuance of any underhanded, secret and dishonest agreement made with U. L. Dike and A. L. Crane or either thereof, by said F. I. Ramos, said F. I. Ramos used the trust and confidence or trust or confidence imposed in him by plaintiff to the end of persuading plaintiff to purchase said property in any manner or at all; deny that as and for a consideration for any abuse and betrayal or abuse or betrayal of plaintiff's confidence, said F. I. Ramos was actually paid, or that he actually received from defendants and defendants agents, or *or* either or any thereof, the sum of fifteen hundred dollars, which he then and there put to his own private account and uses, or [25] either thereof; deny that all the parties to said transaction kept the same secret and away from the knowledge of plaintiff; deny that plaintiff never knew of nor had any knowledge of the payment of the sum of fifteen hundred dollars to said F. I. Ramos, until a time long after it was paid.

And in this regard these defendants are informed and believe and upon their information and belief allege, that in order to get the property referred to in the complaint herein at the sum of fifteen hundred dollars less than was asked for it by the defendants, the said plaintiff, the said plaintiff entered into an agreement with her friend, F. I. Ramos, whereby the said F. I. Ramos, was to demand, and under which he did demand the *the* payment to him by the California Colonization Company of the sum of fifteen hundred

dollars, out of the commissions to be earned by said company in making a sale of said property as a condition precedent to the purchase thereof by the plaintiff, and said company, believing that a sale of said property would not be effected unless it acceded to the said demand of said F. I. Ramos, agreed to pay and afterwards did pay to said F. I. Ramos, said sum of fifteen hundred dollars, out of the commissions earned by it in making a sale of said property, and defendants are informed and believe and upon such information and belief allege that the said F. I. Ramos, immediately upon receiving said sum of fifteen hundred dollars from said company, paid the same and the whole thereof, to plaintiff. These defendants further allege that neither one of them ever knew of the payment of said sum of fifteen hundred dollars to said F. I. Ramos, by the said Colonization Company until long after it was paid, nor did they ever know of an agreement to pay said sum.

X.

Defendants deny that all or any of the representations made by them or either of them or by any agent of either or any of [26] them, named in said complaint or otherwise, in reference to said land and in reference to the character and condition or character or condition thereof, or in any manner or at all, were false, fraudulent and untrue, or false, fraudulent or untrue or that said representations or any thereof, were known by defendants, or by any of them, to be false, fraudulent and untrue or false, fraudulent or untrue, at the time they were made or at any other time; deny that any false, fraudulent and untrue

statements and representations, or statements or representations, were ever made by defendants or either thereof, with the single and sole, or single or sole purpose and intent or purpose or intent of cheating, tricking and defrauding, or of cheating, or tricking or defrauding plaintiff or to entice her to purchase the land described in the complaint herein; deny that any false, fraudulent or untrue statements concerning said land, or its character, condition or extent, were ever made to plaintiff by defendants or either of them, or by any agent or agents of them or either of them;

These defendants deny that they or either of them, or the agent or agents of them or either of them ever represented to plaintiff that six hundred acres of said land was all level and clear, and arable or level or clear or arable or that it was all adapted to growing or raising of alfalfa; deny that they ever represented that said ranch contained six hundred acres; deny that only four hundred and fifty acres of said land is as was represented; deny that the land outside of the levee is practically worthless; deny that seventy-seven acres of said land lying outside of the levee is inundated and submerged land or inundated or submerged land, or that, except in flood time, it is covered by waters of Feather River, or that it is fit for no purpose; deny that seventy-seven acres, or any number of acres of said portion of said land lying outside of said levee is not worth [27] more than ten dollars per acre.

They admit that about fifty-seven acres of said land that was, at the date of purchase thereof by plaintiff, lying outside of the levee has been reclaimed by the

construction of a new levee, but they deny that such acreage is so uneven and so covered with holes and hills, or either thereof, or so densely covered with jungle, brush and trees, or either thereof that it would cost plaintiff more than one hundred and fifty dollars per acre to put said acreage in a condition ready for cultivation.

And in this regard these defendants allege that the reasonable cost of placing said fifty-seven acres in a condition for cultivation would not exceed thirty dollars per acre, and that the value of said land when cleared will exceed two hundred and fifty dollars per acre.

## XI.

Defendants deny that by reason of any false, fraudulent, and untrue, or by reason of any false or fraudulent or untrue representations upon the part of the said defendants or either of them or any agent or agents of defendants or either of them, or that by reason of any fraud, conspiracy, duplicity and double dealing or that by reason of any fraud, conspiracy, duplicity or double dealing of F. I. Ramos, as the agent, or who was made the agent of defendants, or either of them, while he occupied a fiduciary relationship with plaintiff, or that by reason of the duplicity and double dealing, or duplicity or double dealing, upon the part of the said Clinton White, as, or who was made the agent of defendants, while occupying a fiduciary relation with said plaintiff, plaintiff has been damaged and [28] *and* defrauded, or damaged or defrauded in the sum of eighteen thousand seven hundred and fifty dollars, or in

any sum whatever; deny that said plaintiff by reason of the facts alleged in said complaint was induced to pay one hundred and twenty-five dollars per acre for one hundred and fifty acres, or any number of acres of land, either on the inside or outside of the levee referred to in said complaint which she did not bargain for and which or which were perfectly worthless, or worthless in any degree or at all, for the purpose for which plaintiff was buying said land; deny that said one hundred and fifty acres is of no value whatever; deny that plaintiff ever bought any land of defendant at a stipulated price per acre; deny that by any act, representation or statement made by said defendants, at any time or place or by any agent or agents of defendants or either thereof, plaintiff has ever been defrauded, wronged or damaged; deny that said F. I. Ramos or said Clinton White ever were the agents or that they ever acted as the agents of defendants in the sale of the land described in said complaint; deny that there was any fraud, conspiracy, duplicity or double dealing or any element of either thereof on the part of defendants or either of them, in the transactions referred to in the complaint herein.

As a further, separate and distinct defense to plaintiff's cause of action as alleged in her complaint these defendants allege:

## XII.

That on the 27th day of September, 1911, these defendants and the plaintiff herein, entered into a contract in writing, a copy of which contract is in the following words and figures, to wit:

THIS CONTRACT, made this 27th day of Sep-

tember, 1911, between Joseph Scheiber, Morris Scheiber and John Scheiber, of the county of Sutter, State of California, parties of the first part, and [29] Isabelle Garwood, party of the second part, WITNESSETH:

That the parties of the first part agree to sell to the party of the second part, and the party of the second part agrees to buy from the parties of the first part the real property with the improvements thereon, situated in the county of Sutter, State of California, and particularly described as follows, to wit:

Beginning at a point on the left bank of the Feather River, fifteen chains and eighty links below the south west corner of the so called Nicolaus Allgier Tract; running thence down stream following the meanderings of said river to the point where the western boundary line of lot two of the New Helvetia Rancho intersects said river; thence south fifteen degrees and eight minutes east, following said boundary line fourteen chains and forty-four links; thence south sixty-four degrees east six chains and forty-four links; thence south seventy-eight degrees and thirty minutes east, twenty-four chains and fourteen links; thence south fourteen degrees and thirty minutes west, fifteen chains and ninety links; thence south forty degrees east forty-eight chains and seventy links; thence east two chains and forty-five links; thence north fifty degrees east, and thirty-eight chains and eleven links to a point on the extended rear line of said Nicolaus Algier Tract, fifteen chains and eight links distant from the southeast corner of the same; and thence north thirty-nine degrees and thirty-six

minutes west eighty chains to the place of beginning. Also the northeast quarter of section twenty-four, in township twelve north, range three east, Mount Diablo Meridian. The whole containing six hundred acres of land, more or less, and being the whole of the so called Nicolaus Algier Ranch situated below the town of Nicolaus, bounded on the east by the farms of P. Straugh and Phil. R. Drescher, on the north by the Redfield farm, on the west by the Feather River, and on the south by the farms of Claus Peters and John Schwall, at and for the price of seventy-five [30] thousand dollars and upon the terms and conditions hereinafter stated, to wit:

The party of the second part will deposit with the Fort Sutter National Bank of Sacramento, California, of even date, with the execution of this agreement, the sum of five thousand (5000) dollars, which sum of five thousand (\$5000) dollars shall be held by said bank and paid over in accordance with the terms of this contract.

The party of the second part will assume and pay as a part of the purchase price of said property the mortgage thereon, held by the Pacific Mutual Life Insurance Company and given by the parties of the first part and Albin Scheiber.

In addition to said five thousand (\$5000) dollars, so to be deposited in the Fort National Bank, the party of the second part on or before the first day of November, 1911, will pay the parties of the first part a further sum of thirty thousand five hundred (\$30,500) dollars and will also execute, acknowledge and deliver to the parties of the first part a promissory

note for twenty thousand (20,000) dollars and a second mortgage on said lands to secure said promissory note of twenty thousand (\$20,000) dollars. The said mortgage to be substantially in the form made use of by White, Miller & McLaughlin, and said note to be payable on or before three years from its date and to bear interest at the rate of Six (6%) per cent per annum payable annually.

The parties of the first part will execute and acknowledge and upon the receipt of the said five thousand (\$5000) dollars, so to be deposited in the Fort Sutter National Bank and a further payment to them of said sum of thirty thousand five hundred (\$30,500) dollars in cash, and the execution and delivery by the party of the second part of said note and mortgage for twenty thousand (\$20,000) dollars, will duly sign, execute, acknowledge and deliver to the party of the second part a good and sufficient [31] bargain and sale deed to said lands conveying said lands to the party of the second part by good title, free from encumbrances, except the mortgage for nineteen thousand five hundred (\$19,500) dollars, to said Pacific Mutual Life Insurance Company hereinbefore mentioned.

The parties of the first part will as soon as the abstract of title can be continued down to date by a searcher of title, furnish to the party of the second part, a proper abstract of title to said lands for examination, and the party of the second part shall have not less than ten (10) days from the delivery of said abstract of title, to her, to obtain an opinion of title of said lands from an attorney.

If it shall appear that the title to said lands is so defective or that there are such encumbrances thereon that the parties of the first part cannot convey a good title to said lands, then this contract shall be at an end. If the title to said lands shall be in all respects sufficient and free from encumbrances, except said mortgage to the Pacific Mutual Life Insurance Company, the parties of the first part shall execute, acknowledge and deliver said deed to the party of the second part and the party of the second part shall comply with the conditions and covenants in this contract to be performed by her.

If the title to said lands shall prove in some small particular insufficient, but such defect in title shall be such as can be perfected by a suit to quiet title, then the provisions of this contract shall be carried out by both parties and the parties of the first part shall be obligated to pay to the party of the second part the reasonable expense of such suit to quiet title, not exceeding two hundred and fifty dollars (\$250.).

If the title of the parties of the first part shall be found sufficient and if the parties of the first part shall on or before November 1, 1911, execute, acknowledge and tender to the [32] party of the second part a proper deed of conveyance of said lands and the party of the second part shall refuse to accept such deed and refuse to comply with the covenants and provisions in this contract to be performed by her, then said five thousand (\$5,000) dollars, so to be deposited with the Fort Sutter National Bank shall be paid over by said bank to the parties of the first part and shall be treated and considered

as liquidated damages for the failure of the party of the second part to comply with this contract, it being agreed that the actual damages, which would be suffered by the parties of the first part in such event, would be impracticable or extremely difficult to fix.

If, on the other hand, the title of said lands shall, upon examination, prove to be so faulty or insufficient that the parties of the first part cannot give good title to the party of the second part, then said five thousand (\$5,000) dollars shall be returned to the party of the second part by said Fort Sutter National Bank.

If this contract shall be fully complied with by both parties thereto, said five thousand (\$5,000) dollars shall be paid over by said Fort Sutter National Bank to the parties of the first part, and shall be a part of the consideration of seventy-five thousand (\$75,000) dollars, to be paid by the said party of the second part for the said lands.

AND WHEREAS, there is a lot of livestock and other personal property on said lands owned by the parties of the first part, and made use of by them in conducting their farming operations on said lands, and the parties of the first part who desire the transfer of said lands to the party of the second part also desire to sell and transfer to her said livestock and personal property, and the party of the second part in the event of purchasing the lands also desires to purchase said livestock and [33] personal property.

IT IS NOW AGREED that the parties of the first part will sell and deliver to the party of the second

part and the party of the second part will purchase and receive from the parties of the first part said livestock and other personal property on said lands; a full list of said livestock and personal property so to be sold by the parties of the first part to the party of the second part, together with the prices thereof is attached hereto and made a part of this contract and marked Exhibit "A."

IT IS UNDERSTOOD AND AGREED that the purchase price of said personal property shall be paid by the party of the second part, to the parties of the first part in cash at the time of the delivery of the deed of said lands by the parties of the first part to the party of the second part. However it may be the desire of the party of the second part to have some further time within which to make payment to the parties of the first part of the purchase price of said livestock and personal property, and should she wish additional time for that purpose then she shall give the parties of the first part her promissory note for the purchase price of said personal property, payable on or before January 15, 1912, with interest thereon, at the rate of six (6%) per cent per annum, and in such event the mortgage of twenty thousand (\$20, 000) dollars, to be given by her to the parties of the first part on said lands, shall be changed to a mortgage on said lands for said twenty thousand (\$20,000) dollars, and also, to secure the promissory note so to be given by her for the purchase price of said livestock and personal property, and in such event, said mortgage shall also contain and include the mortgage of said personal property in favor of

the parties of the first part with the understanding and agreement that upon the payment by the party of the second part of the promissory note for the purchase price of said livestock and personal [34] *personal* property, the livestock and personal property shall be released from said mortgage, leaving in such event, and under such conditions, only the mortgage on the real estate for the payment of the note of twenty thousand (\$20,000) dollars hereinbefore mentioned.

As to the taxes on the property for the present year it is covenanted and agreed that the parties of the first part shall pay all of the taxes on the personal property and shall pay two-thirds ( $\frac{2}{3}$ ) of the taxes on the real property, the subject of this agreement, and the party of the second part shall pay one-third ( $\frac{1}{3}$ ) of the State and county taxes for the year 1911, on the real property, the subject of this agreement.

The board of supervisors of the county of Sutter have lately provided for the laying out of a new road about one-quarter ( $\frac{1}{4}$ ) of a mile in length along one of the boundary lines of the lands hereinbefore described, and desire a strip of land forty (40) feet in width for that purpose, and it is understood will pay two hundred and fifty-two dollars, for the land so to be taken for road purposes. It is understood that the party of the second part accepts said lands subject to the proceedings taken by said board of supervisors and will be entitled to receive from the county of Sutter, the compensation to be paid for the land

so to be taken for road purposes.

JOSEPH SCHEIBER.

MORRIS SCHEIBER.

JOHN SCHEIBER.

ISABELLE GARWOOD.

**Exhibit "A."**

Being list of the personal property and prices thereof, referred to in contract dated September 27th, 1911, and made between Joseph Scheiber, Morris Scheiber and John Scheiber, parties of the first part, and Isabelle Garwood, the party of the second part. [35]

167 cows at \$60 a head.

42 heifers at \$40 a head.

48 calves at \$20 a head.

4 bulls at \$60 a head.

20 horses at \$350 a span.

All the hogs at market price.

All the chickens for \$100.

2 hay-rakes for \$50.

Cheese Factory, complete \$300.

Gasoline engine and pump \$173.

2 Jackson Forks	}	\$100
1 Swing Derrick		
1 Feed Rack		
12 Pitchforks		
Ropes and Pulleys	}	\$60
1 Double Breaking Cart		
1 Single " "		
1 Standing Scale.		

All 4 ft. wood at \$3 a cord.

All stovewood at \$4 a cord.

(It being understood that two lengths of stovewood constitutes a cord.)

7 sets Stretchers	}	\$175
3 fifth chains		
1 John Deere Plow		
1 -6=horse gang-plow		
1 -4=horse steel roller		
1 -4=horse harrow		
1 single plow		

Blacksmith-shop	}	\$20
1 crosscut circle-saw		
1 grind-stone		

2 boats \$30

3 mowers \$120

4 hay wagons with 4 hay-racks and 3 farming-beds  
\$200

1 spring wagon \$80

9 sets harness \$180

All the hay on the ranch at \$8 a ton stack measurement.

### XIII.

That pursuant to the terms and conditions of said contract [36] and to carry into effect its provisions, plaintiff on the first day of November, 1911, paid to defendants, on account of the purchase price of the real and personal property mentioned and described in said contract, the sum of thirty-seven thousand one hundred and nine dollars in cash, thirty-five thousand of said sum being applied as a payment on the real property described in said con-

tract, and two thousand one hundred and nine dollars being applied as a payment on the personal property described in said contract, and executed and delivered to defendants Joseph Scheiber, Morris Scheiber and John Scheiber, two certain promissory notes, one in the sum of twenty thousand dollars, to be applied as a payment on the purchase price of the real property, and described in said contract, payable on or before three years from date, the payment of which was secured by a mortgage on the said real property, sold by defendants to plaintiff, made and executed by her on the date last aforesaid, to the defendants, Joseph Scheiber, Morris Scheiber and John Scheiber, and which said mortgage was duly recorded in the office of the recorder of the county of Sutter, State of California, on the 9th day of November, 1911, in Book 31 of Mortgages, at page 210, and the other for the sum of nineteen thousand five hundred dollars, to be applied in full payment of the balance due on the purchase price of the personal property mentioned and described in said contract, as agreed by plaintiff and defendants, payable on or before January 15, 1912, the payment of which was secured by a mortgage of even date with said note, executed by the plaintiff to the defendants, Joseph Scheiber, John Scheiber and Morris Scheiber, and recorded in the office of the recorder of the county of Sutter, State of California, on the said 9th day of November, 1911, in Book 31 of Mortgages, at page 213, said mortgage being indexed in the records of said recorder's office, both as real estate and as a chattel [37] mortgage.

Upon the payment of said sum of thirty-seven thousand one hundred and nine dollars in cash, and the execution and delivery to defendants by plaintiff, of the promissory notes and mortgages above described, defendants on said first day of November, 1911, executed and delivered to plaintiff, a deed of said land and premises, and turned over and delivered to her, the whole of the personal property described in said contract, the remaining portion of the purchase price of said lands, being represented by a mortgage executed by the defendants to the Pacific Mutual Life Insurance Company of California which said mortgage and the amount due on said mortgage on said date, as agreed upon by plaintiff and defendants, being the sum of twenty thousand dollars.

That subsequently, plaintiff's said note for said sum of nineteen thousand five hundred dollars, was taken up and paid by her, and the mortgage which secured the payment of the same was duly released and discharged of record by the holders thereof.

#### XIV.

That the real property mentioned, described and referred to in said contract, and in the deed made and executed by the defendants, to plaintiff in pursuance of said contract, consists of a tract of land containing approximately six hundred acres, situated below the town of Nicolaus in said Sutter County which is now and for a period of more than thirty years has been generally known and designated by people of that locality and by residents of Sutter County as the "Nicolaus Allgier Ranch" and it was

the intention of defendants to and they did sell and convey by the deed executed and delivered to plaintiff as hereinbefore alleged, the whole of said property known as the Nicolaus Allgier Ranch, and plaintiff took immediate possession of the whole of said property under said deed, and ever since so taking possession thereof, she has been and still is operating and farming [38] the same.

That prior to the making of the contract of purchase of the real and personal property set forth and described in said contract of September 27, 1911, hereinbefore recited, plaintiff went upon said premises on three different occasions, and viewed said real property and all thereof; and examined said personal property and all thereof; that the defendant, John Scheiber, at the times of such viewing and examination of said real property by plaintiff as aforesaid pointed out to her the true boundaries of said real property, and fully and truthfully explained to her such boundaries, and no false statements or representations were ever made to her at any time or place by these defendants, or by any agent or agents of defendants concerning the said boundaries of said premises, the acreage contained therein, the condition or character of the soil, the acreage planted to alfalfa, or concerning any other matter or thing in connection with the said lands or personal property.

#### XV.

That as agreed in said contract set out in this defense, defendants furnished to plaintiff an abstract of the title to said property and delivered the same to plaintiff, and the said title to said property was, after

due examination made by her, accepted by her.

That plaintiff has never informed defendants or either of them of her desire to have any suit brought to correct any defect in the title to said property, but on the 20th day of September, 1913, plaintiff herself commenced such an action in the Superior Court of the county of Sutter, State of California, which action is still pending in said court, the court number of same being 1472, and defendants stand ready and willing to pay the expense of bringing such suit to judgment, provided such expense shall not exceed the sum of two hundred and fifty [39] dollars, the amount specified for such purpose, in the contract of sale and purchase made between plaintiff and defendants on the said 27th day of September, 1911, and set forth in paragraph twelve of the answer.

#### XVI.

That the defendants and their predecessors in interest in the real property described in the complaint herein and specifically described in paragraph two of this answer for a period of more than twenty-five years up and prior to the date of the execution of the agreement made between plaintiff and these defendants, and set out in paragraph twelve of this answer, had been the owners in fee, in the possession of, and entitled to the possession of all of the real property mentioned and described in the complaint herein and in paragraph two of this answer, and of which plaintiff took possession, and during all of said period of time, all taxes levied or assessed against said property and every part or portion thereof, or which in any manner constituted a lien

thereon were paid by defendants or their predecessors in interest; that at no time during a period of more than twenty-five years next prior to the execution and delivery to plaintiff of the deed to said property by defendants as herein alleged has any person made claim to said property or to any part or portion thereof.

### XVII.

That the contract in this defense above set forth and the sale of the real and personal property in said contract described was subject of and constituted a single transaction; that at the time the said contract was entered into by plaintiff and defendants, it was expressly stated by defendants to plaintiff that they would not sell the said land unless the said personal property was taken also by the purchaser nor would they sell the said personal property unless a sale of the land should be effected at the same time, defendants, being desirous, in one [40] transaction of winding up their farming operations and quitting their farming interests, and the agreement made by plaintiff to purchase both said real and personal property was one of the principal reasons which induced defendants to enter into such contract of sale with plaintiff.

### XVIII.

These defendants never, at any time, or in any manner, directly or indirectly, mislead or deceived plaintiff in their negotiations with her for the sale of said property or any thereof, nor did they or either or any of them misrepresent to plaintiff or mislead her in any particular as to the condition, value, loca-

tion or *intent* of said property or any thereof, and they allege that the purchase price of said real property and of said personal property paid by plaintiff was a fair and reasonable market value of the same at the time of purchase. and that plaintiff was not, in any manner or to any degree defrauded in such transactions.

As a further, separate and distinct defense to plaintiffs cause of action as herein alleged, the defendants herein specially refer to paragraphs twelve, thirteen, fourteen, fifteen sixteen, seventeen and eighteen of this answer, and by special reference to said paragraphs reaver and reallege each and every allegation contained in said paragraphs and make them and each of them a part of this defense.

#### XIX.

That on the 11th of March, 1912, plaintiff herein served upon the defendants a written notice of which the following is a true copy:

“To Joseph Scheiber and Frances Scheiber, (his wife), Morris Scheiber and Emma Scheiber, (his wife), and John Scheiber and Anna Scheiber, (his wife). and to the Pacific Mutual Life Insurance [41] Company of California, a corporation.

You and each of you, take notice that the undersigned does hereby offer to rescind and does rescind the agreement, contract and transaction had between Joseph Scheiber and Frances Scheiber, his wife, Morris Scheiber and Emma Scheiber, his wife, and John Scheiber and Anna Scheiber, his wife, and the undersigned, whereby, on or about the 1st day of November, 1911, Joseph Scheiber and Frances

Scheiber, his wife, Morris Scheiber and Emma Scheiber, his wife, and John Scheiber and Anna Scheiber, his wife, conveyed to the undersigned certain lands and premises situated in the county of Sutter, State of California, and more particularly bounded and described as follows, to wit:

Beginning at a point on the left bank of the Feather River, fifteen chains and eighty (15.80) links below the southwest corner of the so-called Nicolaus Allgier Tract; running thence down stream following the meanderings of said river to the point where the western boundary line of lot two (2) of the New Helvetia Rancho intersects said river; thence south fifteen (15) degrees and eight (8) minutes east, following said boundary line fourteen chains and forty-four (14.44) links; thence south sixty-four (64) degrees east, six chains and fourty-four (6.44) links; thence south seventy-eight degrees (78) and thirty (30) minutes east twenty-four chains and fourteen (24.14) links; thence south fourteen (14) degrees and thirty (30) minutes west, fifteen chains and ninety (15.90) links; thence south forty degrees (40) east, forty-eight chains and seventy (48.70) links; thence east two chains and forty-five (2.45) links; thence north fifty (50) degrees east, thirty-eight chains and eleven (38.11) links to a point on the extended rear line of said Nicolaus Allgier Tract, fifteen chains and eight (15.08) links distant from the south east corner of the same; and thence north thirty-nine degrees and thirty-six (36) minutes west eighty (80) chains to the place [42] of beginning. Also the north east quarter of Section twenty-four

(24), in Township Twelve (12) North, Range three (3) East, Mount Diablo Base and Meridian. The whole containing (600) six hundred acres of land, more or less, and being the whole of the so-called Nicolaus Allgier Ranch situated below the town of Nicolaus, bounded on the east by the farm of P. Straugh and Phil. R. Drescher, on the north by the Redfield farm, on the west by the Feather River, and on the south by the farms of Claus Peters and John Schwall, and being the same land described in a deed recorded in the office of the county recorder of Sutter County, California, in Book 46 of Deeds at page 23, Sutter County Records.

IN PURSUANCE WHEREOF, the undersigned does hereby agree to tender to Joseph Scheiber and Frances Scheiber, his wife, Morris Scheiber and Emma Scheiber, his wife, and John Scheiber and Anna Scheiber, his wife, a deed, and does hereby tender to the said last mentioned parties, and each of them, a deed duly signed and acknowledged before a notary public, so as to entitle the same to be recorded, conveying to you, said last mentioned parties, and each of you, the land as hereinabove described, and by you, the said Scheibers, and each of you, conveyed to her.

The undersigned also demands that you, the said Scheibers, and each of you, cancel and surrender the note made by the undersigned to you, and each of you, for the sum of twenty thousand dollars (\$20,000), dated Sacramento, California, November 1st, 1911, and that you, the said Scheibers, and each of you, release of record the mortgage, which is

recorded in the office of the county recorder of the county of Sacramento, in Book 31 of Mortgages, at page 210, in your favor, upon the lands situated in the county of Sutter, State of California, and more particularly described as follows, to wit:

Beginning at a point on the left bank of the Feather River [43] fifteen chains and eighty (15.80) links below the south west corner of the so-called Nicolaus Allgier Tract; running thence down stream following the meanderings of said river to the point where the western boundary line of lot two (2) of the New Helvetia Rancho intersects said river; thence south fifteen (15) degrees and eight minutes east following said boundary line fourteen chains and forty-four (14.44) links; thence south sixty-four (64) degrees east, six chains and forty-four (6.44) links; thence south seventy-eight degrees and thirty minutes east twenty-four chains and fourteen (24.14) links; thence south fourteen (14) degrees and thirty (30) minutes west, fifteen chains and ninety (15.90) links; thence south forty degrees (40) east, forty-eight chains and seventy (48.70) links; thence east two chains and forty-five (2.45) links; thence north fifty (50) degrees east, thirty-eight chains and eleven (38.11) links to a point on the extended rear line of said Nicolaus Allgier Tract, fifteen chains and eight (15.08) links distant from the south east corner of the same; and thence north thirty-nine (39) degrees and thirty-six (36) minutes west eighty (80) chains to the place of beginning. Also, the north east quarter of section twenty-four (24), in township twelve (12) north, range three (3) east, Mount Diablo Base

and Meridian. The whole containing six hundred (600) acres of land, more or less, and being the whole of the so-called Nicolaus Allgier Ranch situated below the town of Nicolaus, bounded on the east by the farms of P. Straugh and Phil. R. Drescher, on the north by the Redfield farm, on the west by the Feather River, and on the south by the farms of Claus Peters and John Schwall, and being the same land described in a deed recorded in the office of the county recorder of Sutter County, California, in Book 6 of Deeds, at page 23, Sutter County Records.

And the undersigned herewith tenders to you, the said Scheibers [44] and each of you, a release of said note and mortgage prepared for signature and acknowledgment, so as to entitle the same to be put of record, and demands that you execute and acknowledge the same.

The undersigned also hereby offers to return to you, and each of you, everything of value she has received from you, and each of you, by virtue of said contract and transaction hereinbefore mentioned.

The undersigned does offer to you, and each of you, to do all other acts or things that are required of her in order to completely rescind the said transaction referred to, and does hereby offer to restore to you everything of value which she has received from you, or any of you, under said contract or transaction, upon condition that you, and each of you, do likewise.

The undersigned also offers to return, and hereby tenders to you, the said Scheibers, and each of you, one certain warrant No. 225, for the sum of five

thousand, one hundred six and forty-three one hundredths dollars (\$5,106.43), issued by Reclamation District No. 1001, as payment by said Reclamation District for one certain levee erected by you, or your predecessors in interest on said premises.

The undersigned also hereby tenders to Joseph Scheiber and Frances Scheiber, his wife, Morris Scheiber and Emma Scheiber, his wife, and John Scheiber and Anna Scheiber, his wife, the sum of \$282, received by the undersigned as payment for a right of way from the county of Sutter, for one certain county road running through the said premises, and the undersigned further demands that you, the said Scheiber and each of you, indemnify her for, or assume one certain note and mortgage which the undersigned has heretofore executed, payable and secured to the Pacific Mutual Life Insurance Company of California, a corporation, for the sum of twenty thousand dollars (\$20,000).

YOU AND EACH OF YOU, WILL FURTHER TAKE NOTICE that the undersigned [45] demands the return of all moneys paid by her to you, and each of you, or any of you, in connection with the above transaction, and the cancellation and nullification and satisfaction of any indebtedness now existing from the undersigned to you, or each of you, or any of you, as a result of said contract or transaction.

Dated Mar. 11th, 1912.

(Signed) ISABELLE GARWOOD.

That on the 26th day of March, 1912, the plaintiff herein commenced an action in the Superior Court

of the State of California, in and for the county of Sutter, against the defendants herein, said suit being numbered 1338, for the recovery of the sum of thirty-five thousand dollars damages claimed by her upon the identical transaction set forth in her complaint herein and for the recession of the contract of sale entered into between plaintiff and defendants referred to in her complaint herein, and for the cancellation of the note and mortgage, referred to, in paragraph thirteen of this answer, and for the indemnification of plaintiff for the amount of the mortgage debt of \$20,000, due to the Pacific Mutual Life Insurance Company of California, assumed by her as a part of the purchase price of said property.

That, thereafter, and on the 18th day of April, 1912, the defendants in said action, being the same defendants named in this action, appeared in said Superior Court and demurred to said complaint on general grounds, and thereafter, on the 31st day of May, 1912, and before any ruling had been made by said Superior Court on said demurrer, plaintiff filed an amended complaint in said cause containing practically the same allegations as contained in her original complaint; that thereafter, and on the 31st day of May, 1912, the defendants appeared in said cause and demurred to said amended complaint on general [46] grounds, and on the 10th day of June, 1912, the said Court overruled said demurrer and gave defendants ten days in which to answer the said amended complaint of plaintiff. On the 19th day of June, 1912, the defendants made and filed their answer to said amended complaint, and on the 28th

day of June, 1912, plaintiff filed in said cause a demurrer to said answer, of defendants on general and special grounds, and also served and filed a notice that she would, on the 6th day of July, 1912, move the court to strike out certain specific portions of said answer. On the 6th day of July, 1912, the said Superior Court duly made and gave its order overruling the said demurrer of plaintiff to said answer of defendants and denied her said motion to strike out the whole or any part of said answer; that, thereafter, by stipulation of the parties to said suit, it was agreed that said court might on the 24th day of July, 1912, fix a date for the trial of said cause, and afterwards, by stipulation, the matter of fixing a date for said trial was continued until the 15th day of September, 1912. On the 12th day of September, 1912, the said action, without notice to defendants, was dismissed by plaintiff and a judgment of dismissal entered therein by the clerk of said court.

## XX.

That these defendants allege that by reason of the election of plaintiff to rescind the contract made between her and these defendants, and referred to in the next preceding paragraph and that by reason of serving upon said defendants the said notice set out in said last named paragraph, and that by reason of the commencement and prosecution of the action in said Superior Court of Sutter County, mentioned and referred to in paragraph nineteen of this answer, she is estopped and debarred from bringing or prosecuting this action in this court.

WHEREFORE, these defendants pray this Honorable Court to [47] be hence dismissed with their reasonable costs and charges in this behalf and for such orders as may be meet and proper in the premises.

ARTHUR E. MILLER and  
A. H. HEWITT,

Attorneys for Defendants.

State of California,  
County of Sutter,—ss.

Morris Scheiber, being duly sworn, deposes and says, that he is one of the defendants named in the above and foregoing answer; that he has read the said answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information or belief, and that as to those matters he believes it to be true.

MORRIS SCHEIBER.

Subscribed and sworn to before me this 25th day  
of May, 1914.

[Seal]

A. H. HEWITT,

Notary Public in and for the County of Sutter,

State of California. [48]

(Here follows affidavit of service.)

[Endorsed]: Filed May 26, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [49]

[Title of Court and Cause.]

**Stipulation Waiving Jury.**

It is hereby stipulated by and between the respective parties to the above-entitled action that said action may be set down for trial by the court to be heard and tried by the Judge sitting as a court without a jury, the Court to hear and determine all questions of law and fact without a jury.

And it is stipulated and agreed by and between the respective parties that in the event of judgment for one party the other party has a perfect right to appeal from said judgment and that in the event of an appeal taken by one of the parties the other party will not raise any objection to said appeal on any point of law based on the fact that said cause was heard by the court without a jury.

LLOYD MACOMBER,  
Attorney for Plaintiff.

Dated Nov. 9, 1914.

A. E. MILLER and  
A. H. HEWITT,  
Attorneys for Defendants.

[Endorsed]: Filed Nov. 9, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [50]

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[Title of Court and Cause.]

**Answer to Amendment to Complaint.**

Come now the defendants, in the above-entitled action, and answering the amendment to the bill of complaint of plaintiff herein for grounds of answer,

admit, deny and allege as follows:

Defendants deny that plaintiff has been defrauded in any manner or at all by any representations of defendants or their agents, or either thereof; deny that said defendants and their agents, or either or any thereof, ever represented to plaintiff that said land consisted of six hundred acres, or that said land was all first class alfalfa land, then capable or at any time capable of producing five or six or any number of cuttings to the year, or that it would cut eight to ten tons to the acre each season;

Defendants deny that they or their agents or either thereof, ever represented to plaintiff that all of said land, referring to the land sold to plaintiff and described in the complaint herein was clear and level or clear or level, and suitable then for raising alfalfa; deny that they or either of them ever represented to plaintiff that two hundred and fifty acres of said land were at that time or any time planted to alfalfa, or growing and producing or growing or producing alfalfa; deny that they or either of them ever represented to plaintiff that the balance and remainder or balance or remainder [51] of said six hundred acres or any number of acres, not at that time planted to alfalfa, could then be planted to alfalfa; deny that they or either of them ever represented to plaintiff that all the conditions or any of the conditions were suitable for such use being immediately made of all of said land or that the said remaining three hundred acres or any number of acres could be immediately used for alfalfa, in any manner or at all;

Defendants deny that they and their agents, or

either thereof, ever represented to plaintiff that all of said land which they were selling to plaintiff was protected from overflow by levees.

Defendants deny that they and their agents or either thereof, ever represented to plaintiff that all of said land which they were selling plaintiff was what is known as river bottom land or what was known as subirrigated land; deny that they and their agents or either thereof, ever represented to plaintiff that the water from Feather River percolated through said land to such an extent or to any extent that it furnished water to the roots of the alfalfa, thereby rendering irrigation unnecessary to the growing of alfalfa; deny that they and their agents or either thereof, ever represented to plaintiff that either with or without irrigation, said land would produce five or six cuttings of alfalfa every year.

Defendants deny that certain portions or any portions of said land sold by them to plaintiff were not as represented by them to plaintiff in every point and particular; defendants deny that two hundred acres or any number of acres of said land were not as represented by them to plaintiff in respect to overflow and in respect to subirrigation and productive qualities, or in respect to either of said matters; deny that two hundred acres of said land, the same being the one hundred and sixty acres in the southerly portion of said tract, and the forty [52] acres lying just north of the same referred to in the amendment to the bill of complaint of plaintiff, were not as represented by them to plaintiff.

They admit that a portion of said land has been

covered with water during a portion of the flood seasons of each year, prior to the year 1914, and they allege that before plaintiff purchased said land, she knew of such fact.

Defendants deny that they or their agents, or either thereof, ever represented to plaintiff that said land was entirely free from flood waters, and they allege that plaintiff had actual knowledge prior to her purchase of said lands, that said lands were situated in a Reclamation District, and that such district was formed to protect said lands, and other lands of the district from overflow during the flood seasons of each year.

Defendants deny that it is impractical and impossible or impractical or impossible to raise alfalfa on land which during the winter time is submerged with water continuously for ten days or less.

Defendants deny that the nature of the soil of the two hundred acres referred to in plaintiff's Amendment to her bill of complaint, or of any portion of said entire ranch is such that water from the river does not penetrate it or that it does not have sufficient moisture to produce alfalfa in the way it was represented to do by defendants and their agents or by either thereof.

Defendants deny that the two hundred acres of said land referred to in plaintiff's said Amendment to her bill of complaint, or any portion of said two hundred acres is unsuited for raising alfalfa, or that any alfalfa planted by plaintiff on said land died because of the unsuitableness of the land for alfalfa. [53]

Defendants are unable to state the source of the information of plaintiff to the effect that they purchased said land less than three years prior to the date of the sale thereof to plaintiff, but in this regard, they assume that her statement of the time of purchase is fully as accurate as other statements made in her complaint.

Defendants allege that they purchased the land sold by them to plaintiff described in the complaint and more definitely described in the answer herein from the Pacific Mutual Life Insurance Company of California, on the 15th day of December, 1889, the contract for which purchase was recorded in the office of the recorder of the county of Sutter, State of California, on the 9th day of November, 1901, in Book 30 of Deeds, at page 124, and that the market value of said land at the date of the sale thereof to plaintiff exceeded the sum of seventy-five thousand dollars, and that the market value of the same, at the time of filing the Amendment to the bill of complaint of plaintiff, to wit, on the — day of July, 1915, exceeded the sum of one hundred and twenty thousand dollars.

Defendants deny that any of said land sold by them to plaintiff was otherwise than as represented by them; and they deny that said plaintiff has been damaged in the sum of thirteen thousand dollars, or any other sum whatever, by reason of such sale or otherwise or at all.

WHEREFORE, these defendants pray this Honorable Court to be hence dismissed with their reason-

able costs and charges in this behalf, and for such order as may be meet in the premises.

ARTHUR E. MILLER and

A. H. HEWITT,

Attorneys for Defendants. [54]

State of California,

County of Sutter,—ss.

John Scheiber, being duly sworn, deposes and says: That he is one of the defendants named in the above and foregoing answer to the Amendment of Plaintiff to her bill of complaint filed herein; that he has read the said answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information or belief, and that as to those matters he believes it to be true.

JOHN SCHEIBER.

Subscribed and sworn to before me this 12th day of July, 1915.

[Seal]

A. H. HEWITT,

Notary Public, in and for the County of Sutter, State of California.

(Here Follows Affidavit of Service.)

[Endorsed]: Filed July 13, 1915. Walter B. Mal-  
ing, Clerk. [55]

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[Title of Court and Cause.]

**Amendment to Complaint.**

Leave of Court being first had and obtained, plaintiff in the above-entitled action files this, her Amendment to the complaint in said action, and hereby

amends said complaint by filing an additional paragraph in said complaint, which additional paragraph plaintiff designates as paragraph No. 10-A.

No. 10-A.

Plaintiff has been further defrauded by defendants in this action, in this, to wit, said defendants and their agents represented to plaintiff that said land consisted of 600 acres, all first class alfalfa land, then capable of producing five and six cuttings to the year, and that it would cut eight to ten tons to the acre each season, and plaintiff then and there believed all that was told her by defendants and their agents in respect to said land and purchased the same purely by reason of the fact that she believed it to be of the character represented.

Defendants and their agents represented to plaintiff that all of said land which they were then selling the plaintiff, was clear and level and suitable then for the raising of alfalfa, [56] and that two hundred and fifty acres of said land was at that time planted to, and growing and producing alfalfa, and that the balance and remainder of said six hundred acres, that is the remaining three hundred and fifty acres, not then planted to alfalfa, could be then planted to alfalfa, and that all the conditions were suitable for such use being immediately made of all of said land and that the said remaining three hundred acres could be immediately used for alfalfa, the same as the adjoining land upon which alfalfa was then growing.

That said defendants and said defendant's agents represented to plaintiff that all of said land which they were selling her was protected from overflow by

levees, when in truth and in fact said land was not protected from overflow by levees, as will more particularly appear hereafter.

That defendants and defendant's agents represented to plaintiff that all of said land which they were selling plaintiff was what is known as river bottom land and was what is known as subirrigated land, that is, said defendants and defendant's agents represented to plaintiff that the water percolated through said land from the Feather River to such an extent that it furnished water to the roots of the alfalfa and thereby rendered irrigation unnecessary, so that without irrigation alfalfa could be raised upon said land to such an extent as to yield five and six cuttings of alfalfa every year.

That a certain portion of said land sold to plaintiff is not as it was represented, as just hereinabove alleged, and the portion of said land which was not as represented in respect to freedom from overflow and in respect to [57] subirrigation and productive qualities is as follows, to wit, 200 acres the same being the 160 acres in the southerly portion of said land which said 160 acres is described as the Northeast quarter of section 24 in township 12, north range 3 east, M. D. M., and also the 40 acres of land lying just north and slightly west of said 160 acres, that is to say, the 200 acres of the land sold to plaintiff lying to the extreme southeasterly end of the tract and the farthest from the river is not as it was represented to be by said defendants and their said agents.

That so far from being as it was represented to plaintiff by said defendants and their said agents,

said 200 acres of land, during the winter time, has always been covered with water to considerable depth for periods lasting continuously for more than 10 days and that such inundation is absolutely fatal to alfalfa roots, and it is impracticable and impossible to raise alfalfa on land which, during the winter time is submerged with water continuously for more than 10 days; and that so far from being as represented to plaintiff by defendants and their agents that said 200 acres is not what is known as river bottom land and is not subirrigated, and is not capable of producing alfalfa without irrigation and this, for the reason that the nature of the soil of said 200 acres, is such that the water from the river does not penetrate it and it does not have sufficient moisture to produce alfalfa in the way it was represented to do by defendants and their said agents.

That plaintiff, since purchasing said land, planted alfalfa in a portion of said 200 acres just hereinbefore mentioned which said land, as is herein alleged, is unsuited for raising alfalfa and said alfalfa did not grow and died [58] out and said dying out of said alfalfa was the result of the unsuitableness of the land for alfalfa as is hereinbefore just alleged.

That said two hundred acres, so unsuited to the raising of alfalfa by reason of the overflows aforesaid, was at the time of purchase by plaintiff, not worth more than sixty (\$60) dollars per acre at the outside, as said land never was used for alfalfa, but always has been used as grain land.

That the defendants in this action, at the time they purchased said land, less than three years previously,

paid much less than sixty (\$60) dollars per acre, and said price represented a fair valuation thereon, and the market value of said land, was in no ways enhanced during said three years.

That since the purchase of said land by plaintiff, said two hundred acres have been reclaimed from the overflow of the waters of the aforesaid Bear River and Sacramento River by large and extensive and highly expensive reclamation work, and in so far as overflow is concerned, said land has been protected from overflow, and said work and expense of protecting said land from overflow has been necessary and compulsory upon plaintiff, and has cost plaintiff in assessments upon said land so purchased, more than twenty thousand (\$20,000) dollars, and in order to reclaim said land from overflow and place the same in respect to overflow in a condition such as it was represented to be by defendants and their agents, plaintiff has had to expend the sum of more than twenty thousand (\$20,000) dollars.

That by reason of said two hundred acres of land not being as represented by defendants, and by reason of its being worth only sixty (\$60) dollars per acre instead of one hundred and twenty-five (\$125) dollars per acre, which plaintiff paid [59] for it, plaintiff has been damaged thereby in the sum of thirteen thousand (\$13,000) dollars.

WHEREFORE, plaintiff prays that the damage of thirteen thousand (\$13,000) dollars, alleged in this Amendment of the Complaint, may be adjudged and awarded in this action, and that plaintiff may have judgment for thirteen thousand (\$13,000) dollars

against said defendants in said action, in addition to the amount prayed for in said complaint as originally filed, and together with interest on said \$13,000.

LLOYD MACOMBER,

Attorney for Plaintiff.

Dated June 23d, 1915. [60]

State of California,

City and County of San Francisco,—ss.

Isabelle Garwood, being first duly sworn, deposes and says: That she, this affiant, is the plaintiff mentioned in the within, foregoing, and hereto attached amendment to complaint; that she has read said amendment to complaint, and knows the contents thereof, and that the same is true of her own knowledge, save and except as to those matters which are therein stated upon her information and belief, and that as to those matters that she believes it to be true.

ISABELLE GARWOOD.

Subscribed and sworn to before me this 23d day of June, 1915.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 15, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [61]

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[Title of Court and Cause.]

**Dismissal as to Certain Parties.**

Whereas the plaintiff in the above-entitled action desires to prosecute said action against Joseph Scheiber, Morris Scheiber, and John Scheiber, but does not

desire to prosecute said action against Frances Scheiber, nor Emma Scheiber, nor Anna Scheiber,

Now, therefore, plaintiff in the above-entitled action hereby dismisses said action in so far as it affects said defendants Frances Scheiber, or Emma Scheiber, or Anna Scheiber, and as to said three parties the clerk of the court is authorized and instructed to enter dismissal of record in said action, but with the proviso and understanding that said action will continue in full force and virtue against Joseph Scheiber, and Morris Scheiber, and John Scheiber, and as to said last three named defendants be in no wise affected by this dismissal as to the others.

Dated May 3d, 1915.

LLOYD MACOMBER,

Attorney for Plaintiff.

[Endorsed]: Filed Jul. 21, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [62]

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At a stated term to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Friday, the 18th day of February in the year of our Lord, one thousand nine hundred and sixteen. PRESENT: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,701.

ISABELLE GARWOOD,

vs.

JOHN SCHEIBER et al.

**Order That Judgment be Entered.**

In accordance with the decision of Honorable Wm. H. Sawtelle, District Judge, it is ordered that judgment be entered in favor of defendants and for costs.  
[63]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 15,701.

ISABELLE GARWOOD,

Plaintiff,

vs.

JOSEPH SCHEIBER, MORRIS SCHEIBER,  
JOHN SCHEIBER,

Defendants.

**Judgment.**

This cause having come on regularly for trial on the 16th day of July, 1915, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed; Lloyd Macomber, Esq., appearing as attorney for plaintiff and A. H. Hewitt and Arthur E. Miller, Esq., appearing as attorneys for defendants; and the trial having been proceeded with on the 21st, 24th, 26th, 27th and 28th days of July, all in said year and oral and documentary evidence on behalf of the respective parties, having been introduced and the cause having been submitted to the Court for consideration and deci-

sion, and the Court, after due deliberation, having ordered that judgment be entered in favor of the defendants:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court, that plaintiff take nothing by this action and that defendants go hereof without day; and that said defendants do have and recover of and from said plaintiff their costs herein expended, taxed at \$835.30.

Judgment entered February 18, 1916.

A true copy. Attest:

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: Filed Feb. 18, 1916. Walter B. Maling, Clerk. [64]

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[Title of Court and Cause.]

**Clerk's Certificate to Judgment-roll.**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 18th day of February, 1916.

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: Filed Feb. 18, 1916. Walter B. Maling, Clerk. [65—66]

[Title of Court and Cause.]

**Engrossed Bill of Exceptions.**

Be it remembered that the above-entitled action duly came on for trial in the above-entitled court, in the Second Division thereof, the Honorable Wm. Sawtelle, Judge presiding, sitting without a jury (a jury trial having been duly waived by stipulation in writing duly filed, which said stipulation reserved all rights of appeal to the parties in the event that either should be dissatisfied and wished to appeal or prosecute a writ of error), on Friday, the 16th day of July, 1915, at the hour of ten o'clock A. M. of said day, the trial of said action being resumed on Wednesday, the 21st day of July, 1915, and further resumed on Saturday, the 24th day of July, 1915, and further resumed on Monday, the 26th day of July, 1915, and further resumed on Tuesday, the 27th day of July, 1915, and further resumed on Wednesday, the 28th day of July, 1915, at the termination of which said day the Honorable Wm. H. Sawtelle, Judge presiding, stated to counsel for the respective parties that he was compelled to depart at once for his own district in Arizona, and made the request of counsel that they stipulate that all further testimony be taken by a commissioner selected by them for that purpose, and that, [67] after the taking of testimony should be completed, a transcript of the same, together with the record of the action and the briefs and written argument of counsel, be sent to him at his home in Arizona for submission, and that such judgment as he might render

in said action might thereafter be entered by the Honorable Wm. C. Van Fleet, Judge of the United States District Court for the Northern District of California; this stipulation was duly entered into by counsel for the respective parties, Mr. Lloyd Macomber appearing as counsel for the plaintiff, and Mr. A. H. Hewitt and Mr. Arthur E. Miller appearing as counsel for the defendants; evidence, both oral and documentary was offered and introduced by each of the respective parties to said action, and, pursuant to said stipulation, the entire record in said action was thereafter forwarded by the clerk of the court to the Honorable Wm. H. Sawtelle, at his home in Arizona, and the cause submitted to him for his determination and decision; that thereafter the said Honorable Wm. H. Sawtelle made his decision in said action in favor of the defendants therein, without findings or written opinion, and communicated his judgment and decision to the said Honorable Wm. C. Van Fleet, who thereafter, pursuant to said stipulation as aforesaid, caused said judgment to be entered in said action on Friday, the 18th day of February, 1916, against the plaintiff and in favor of the defendants in said action.

The plaintiff is dissatisfied with said decision and judgment, and appeals therefrom and from every part thereof; and plaintiff accordingly proposes the following bill of exceptions for use upon said appeal or writ of error as aforesaid.

Plaintiff excepts to said judgment and decision upon the ground that the evidence is insufficient to justify said decision, and that said decision is against

law, and complains that said decision is entirely unsupported by the evidence and is contrary to the evidence, and complains of said decision as error, and excepts thereto, and [68] assigns this exception as

#### EXCEPTION NUMBER ONE,

and as for the particulars in which the evidence is insufficient to justify said decision, and as for the particulars in which said decision is contrary to the evidence, plaintiff specifies as follows:

The evidence shows that the land involved in the issues of this action was sold to the plaintiff by the acre and not in gross.

The evidence shows that said land was sold to the plaintiff, and that she bought the same, as six hundred acres at the agreed price of one hundred and twenty-five dollars per acre.

The evidence shows that said land was represented to plaintiff and sold to her as six hundred acres of first-class alfalfa land, which was protected from overflow by levee; and that plaintiff bought said land upon and by reason of those representations. The evidence shows that not more than two hundred and fifty acres were as represented.

The evidence shows that instead of there being six hundred acres, there was an absolute shortage of seventy acres.

The evidence shows that instead of there being six hundred acres to said land of a character best adapted to the raising of alfalfa, there was only four hundred and fifty acres which could be used for any agricultural purpose whatever, and that there was

not more than four hundred and fifty acres of said land which had any agricultural or commercial value. The evidence shows that not more than four hundred and fifty acres of said land had ever been used by defendants for agricultural purposes, and that there was not more than four hundred and fifty acres which could be used for any agricultural purpose.

The evidence shows that of the four hundred and fifty acres which might be used for agricultural purposes, not more than two hundred [69] and fifty acres could be used for growing alfalfa, and that the remaining two hundred acres was subject to overflow to such an extent that the raising of alfalfa thereon was a commercial impossibility.

The evidence shows that of the four hundred and fifty acres of said land which plaintiff actually received which was capable of being used for agricultural purposes, the two hundred acre portion thereof which was subject to overflow was not worth more than sixty dollars per acre.

The evidence shows that defendants and their agents took plaintiff upon said land, but that in so doing they were careful to show her only the portion thereof which could be used for agricultural purposes, and purposely refrained from showing her the swamp land outside of the old levee, and purposely refrained from showing her that seventy acres of said land was at that time beneath the channel of a navigable river, and for that reason not their property and impossible of being conveyed by them, and said defendants purposely refrained from advising plaintiff of the fact that not more than four hundred

and fifty acres of said land could be used for any agricultural purpose.

The evidence shows that plaintiff has been damaged in the sum of more than twenty-one thousand dollars which she has had to pay in reclamation assessments to reclaim and protect from overflow land which in said sale to her was represented to her as being free from overflow.

The evidence shows that notwithstanding this expenditure of money for reclamation purposes she still has only two hundred and fifty acres of land which is as was represented to her.

The evidence shows that said land was represented to plaintiff as being subirrigated (meaning self-irrigated), and that no irrigation would be necessary for the raising of alfalfa; and the evidence shows that the same two hundred acres which were hereinbefore stated [70] to be worth but sixty dollars per acre, that is to say, the two hundred acres at the southeasterly most end of the tract has so little subirrigation that it is not commercially practicable to attempt to raise alfalfa thereon without artificial irrigation.

The evidence shows that the plaintiff, at the time the said land was sold to her, was a woman without any business experience or understanding, and without any experience or understanding of any character in reference to land or farming, and without any experience or understanding whatever in reference to matters appertaining to said land or the purchase thereof, and that she fully believed and relied upon the representations of defendant's agents; and the

evidence shows that these facts were well known to defendants' said agents.

The evidence shows that in purchasing said land plaintiff was guided by and acted upon the advice and counsel of a friend and adviser, one F. I. Ramos, with whom plaintiff occupied a confidential relationship—with whom she was engaged to be married—which fact was at all times well known to defendant's said agents who represented them in said sale; and the evidence shows that, in so far as the selection of said land was concerned, said F. I. Ramos was the confidential agent of the plaintiff, which said fact was at all times well known to defendant's said agents.

The evidence does not show that said F. I. Ramos was the agent of the plaintiff for any purpose whatsoever other than to advise her in respect to what land she should or should not buy; and the precise extent of the power and agency of said F. I. Ramos for the plaintiff was well known to defendants' said agents.

The evidence shows that defendants' said agents bribed and corrupted plaintiffs' said confidential agent and adviser, said F. I. Ramos, by secretly paying to said F. I. Ramos the sum of fifteen hundred dollars, and that by reason of the said bribery and [71] corruption of plaintiff's said betrothed and confidential agent and adviser, plaintiff was misadvised and misled to her financial prejudice and damage in the sum and amount prayed for in her complaint.

The evidence shows that said land was represented

to plaintiff as being "River Bottom" land, and as being subirrigated; and the evidence shows that not more than the aforesaid two hundred and fifty acres were of that character.

The evidence shows that the said land is of the following character and value, and was of the following character and value at the date of said sale, that is to say:

(1) The two hundred and fifty acres of said land lying immediately east and south of the old levee is of a character practically the same as represented by said defendants' agents, and that said two hundred and fifty acres was at said time worth not more than the price plaintiff paid for it, to wit, one hundred and twenty-five dollars per acre.

(2) The two hundred acres lying at the southeasterly end of the said tract were not as represented by defendants' said agents, either in respect to overflow, or in respect to subirrigation, or in respect to the character of the soil, and said two hundred acres was at the time of said sale worth not more than sixty dollars per acre.

(3) That the remainder of said land, to wit, all of that which lies outside, or northwest of the old levee, is not as represented in any respect whatsoever, and is useless for any agricultural purpose, and is commercially worthless.

That all material evidence, bearing upon each and all of the foregoing specifications of particulars in which the evidence is contrary to the decision, and in which the evidence is insufficient to justify the

decision, and certain additional exceptions to the rulings of the Court upon admission of evidence, are as follows: [72]

**Testimony of H. H. Jones, for Plaintiff.**

H. H. JONES, a witness called upon behalf of the plaintiff, testified as follows:

My name is H. H. Jones. I reside in San Rafael. I am a licensed civil engineer and surveyor. On behalf of the plaintiff in this action I investigated a piece of property in Sutter County. I surveyed the exterior boundaries and determined its acreage, which work I did from the 15th to the 20th day of April of the year 1915. I have passed all the requirements of a licensed engineer and surveyor imposed by the law of this State, these requirements consist of various examinations and recommendations from other surveyors. I surveyed the ranch in Sutter County, which now belongs to Isabelle Garwood. This place is located in Sutter County; it lies in section 24, township 12 north, range 3 east. I drew a map of the place. I obtained the information which enabled me to survey the place from various sources from survey records, as from the United States Government records in the Appraiser's Building here in San Francisco, and from the county surveyor, or his deputy in Yuba City, and also by having the lines pointed out to me by various people who knew the lines. I had a young man with me by the name of Peter; he was the principal man, and as I progressed with the lines, as those lines coincided with Government records in the description which I got from the Government, and also with the deed, I concluded that

(Testimony of H. H. Jones.)

those were the lines of the ranch. I had a description taken from the deed; a description of the ranch in general. There were two descriptions. The deed I believe was from Scheiber to Garwood. I went all the way around this particular property. There was at that time living upon the place a man by the name of Duff, whom I believe is the lessee. I know the house in which [73] Mr. Duff lives. The house was located somewhere near the south central portion of the yellow colored part of the map; I found it located approximately in there. Those lines on the map which you indicate represent levees. The old levee at this point bends around. Mr. Peter was familiar with the ground around there. Yes, I know whose land it is that adjoins the Garwood place on the south side; it is Saylor's place and Peter's place. One piece belongs to Scheiber; one piece belongs to Saylor. That piece immediately on the north belongs to Straugh, and one piece owned by Dresher. The young man who helped me make the survey is an old resident there; he was acquainted with Mr. Duff, the man on the ranch. Peter and I together met Mr. Duff. I knew I was on the right piece of property; I have located the official map of Sutter County and noted and recognized where the old and new levees come together. The map which I prepared of the Garwood land, and which you now have there on the board is according to the official map of Sutter County. The square, which you indicate at the southeast end of the land, is the northeast quarter of section 24, township 12 north, range 3 east.

(Testimony of H. H. Jones.)

I computed the area of this ranch, the land is all fenced. Yes, sir, I secured the northeast corner of the northeast quarter of section 24, township 12 north, range 3 east. Yes, sir, that is the corner from which you indicate on the map. In surveying the ranch I located that corner and then ran north along the easterly boundary of that property to the point which you indicate, proceeding in a northerly direction. Yes, sir, I then intersected the southerly line of the town of Nicolaus filed in the records there, and followed that along 125 or 130 feet until I came to the long line of the property, which runs to the river. I then followed that line to the levee to the northwest corner of the property, then I intersected the [74] levee. I followed the line of the levee back to a point where that easterly line of the ranch was intersected, and then again to the easterly corner of the old levee I proceeded in a northeasterly direction.

The COURT.—Q. Indicate on the map the direction that you ran. I think I can understand it better, if Counsel have no objection.

Mr. MACOMBER.—Certainly not.

A. I followed this line to an intersection of the old levee and thence followed the old levee to an intersection of the levee and the northwest line of this property. I came back then to a point of number along that intersection.

The COURT.—Q. That is the east line?

A. Yes, sir; I came back where the east line of the Garwood property would have intersected the levee just at this point, which is the intersection of the

(Testimony of H. H. Jones.)

center line of the old levee, and the easterly line of the property. That constituted the survey of this side. I then went back to this point to the northwest corner and followed to the westerly and southerly boundary of the tract to a corner in the westerly boundary of the property, thence along this line on the west, and thence to the intersection line to a point in the northerly line of the northeast quarter of section 24, township 12 north, range 3 east. I followed that line to the point of the beginning, which was my survey.

Mr. MACOMBER.—Q. Have you the description which you checked up, that which I gave you?

A. I do not think I have it with me.

The COURT.—Is that description taken from the deed? Does the deed contain that description?

Mr. MACOMBER.—I gave the gentleman a description which was the description which is a copy of the description in the deed, and I would like to have him identify it and have it admitted in evidence so that no dispute can possibly arise in the future as [75] to whether or not he was on the parcel of land.

Q. Will you glance over that, Mr Jones. I hand you, Mr. Jones, merely a description of the land, as one description which appears in the deed which the plaintiff received from the defendants and the other description there is the description which you embodied in your answer.

Mr. HEWITT.—As I understand it both descriptions are in the answer, or rather the first description

(Testimony of H. H. Jones.)

is in the complaint and the second description is in the answer.

Mr. MACOMBER.—Yes.

The COURT.—What is the difference between the two?

Mr. HEWITT.—One is a little more definite than the other.

Mr. MACOMBER.—The description which appears in the complaint is the description which was in the deed to the land which the plaintiff received. The other description was a description given me voluntarily by Mr. Hewitt which he said was a better description of the land and which he alleged in his answer. I think the description contained in the answer embodies more land, if I am not mistaken.

Mr. HEWITT.—If the Court will permit me to answer the question, I will.

The COURT.—Yes.

Mr. HEWITT.—Upon reading the description in the deed it starts in at a certain point—in fact it is not so very long and I think the Court can get it quicker and better by reading it. The description in the deed to the property to Miss Garwood which is in Sutter County reads as follows:—Before proceeding may I ask a question?

The COURT.—Yes.

Mr. HEWITT.—Q. Is that Feather River?

A. Yes, sir.

Q. Is that the cut-off?

A. The cut-off is further down here. [76]

(Testimony of H. H. Jones.)

(Pointing.) This point is where the old river channel is. (Pointing.)

(The description is as follows:)

“Beginning at a point on the left bank of the Feather River fifteen chains and eighty (15.80) links below the southwest corner of the so-called Nicolaus Allgier Tract; running thence down stream following the meanderings of said river to the point where the western boundary line of lot two (2) of the New Helvetia Rancho intersects said river; thence south fifteen ( $15^{\circ}$ ) degrees and eight (8') minutes east, following said boundary line fourteen chains and forty-four (14.44) links; thence south sixty-four ( $64^{\circ}$ ) degrees east six chains and forty-four (6.44) links; thence south seventy-eight ( $78^{\circ}$ ) degrees and thirty minutes (30') east twenty-four chains and fourteen (24.14) links; thence south fourteen ( $14^{\circ}$ ) degrees and thirty (30') minutes west, fifteen chains and ninety (15.90) links; thence south forty degrees ( $40^{\circ}$ ) east forty-eight chains and seventy (48.70) links; thence east two chains and forty-five (2.45) links; thence north fifty ( $50^{\circ}$ ) degrees east thirty-eight chains and eleven (38.11) links to a point on the extended rear line of said Nicolaus Allgier Tract, fifteen chains and eight (15.08) links distant from the southeast corner of the same; and thence north thirty-nine ( $39^{\circ}$ ) degrees and thirty-six (36') minutes west eighty (80) chains to the place of beginning. Also the northeast quarter of section twenty-four (24) in township twelve (12) north, range three (3) east, Mount Diablo Base and Merid-

(Testimony of H. H. Jones.)

ian the whole containing six hundred (600) acres of land, more or less, and being the whole of the so-called Nicolaus Allgier Ranch situated below the town of Nicolaus, bounded on the east side by the farms of P. Straugh and Phil R. Drescher [77] on the north by the Redfield farm, and on the west by the Feather River, and on the south by the farms of Claus Peters and John Schwall, and being the same land described in a deed recorded in the office of the county recorder of Sutter County, California, in Book 46 of Deeds, at page 23, Sutter County Records."

Mr. HEWITT.—Q. Is that the Feather River?

A. Yes sir.

Q. Is that the cut-off?

A. The cut-off is further down here. (Pointing.) This point is where the old river channel is. Yes, I have the old channel of the Feather River on the map; here it is. (Pointing.) That land between the two levees is a portion of the land in question. The levees do not meet on that property. Yes, I surveyed this land in reference to this area; north and west of this northeast quarter. I went all around it; I computed the acreage; I know the acreage. I surveyed the old levee from the point where the old levee intersects the northeasterly boundary of the ranch. I computed by accurate measurement the number of acres covered by the old levee. I surveyed the new levee over from the place where the new levee intersects the northeasterly boundary line of the ranch to the point where it intersects the

(Testimony of H. H. Jones.)

southerly line down the river. I measured the levee; I estimated the width of the levee; I computed the number of acres covered in the area lying between the two levees. I know the number of acres in that area. I estimated the number of acres that are covered by roads on the southwesterly boundary of the land, and the road running along the old levee. I know the number of acres covered by those roads.

The COURT.—Q. How many acres did you find in the property that you surveyed, including the land taken up by the roadway and the levees, or rather, within the exterior boundary. [78]

A. 535 acres.

Q. 535 acres?

A. Yes, sir, there are approximately 73 and 8/10th acres between the two levees. Yes, sir, by that description I surveyed the ranch. The metes and bounds as set forth in the deed checked up all right with the exception of a portion next to the river. That is the portion outside of the new levee. Yes, it checked up very well, that portion of the land which is inside of the levee; that is, the reclaimed portion of the land excluding roads and levees I found to be 450.365 acres. That includes the quarter section at the southeasterly portion of the land. Yes, sir, 450.365 acres in all. That is the net amount of land which can be used for agricultural purposes; that is the net amount of land inside the levee. I know of my own knowledge that that was the land owned by Isabelle Garwood in Sutter County. I

(Testimony of H. H. Jones.)

know of my own knowledge that that is the land concerning which this controversy is in regard to.

Cross-examination.

I located the section corner lying between 19, 16, 18, 24 and 31 from the Government notes which I obtained from San Francisco, and from the surveyor-general, and other data I also obtained from a Mr. Von Geldern in Yuba City. The corner lies on the south side very close to the fence. I could locate it from Government notes because there is a record. I could tell that that was the corner because there was a certain poplar tree lying on the south corner further to the east; the section line will be from stakes made by Mr. Von Geldern in a previous survey. I surveyed the distance from above the cross from the poplar tree; I have forgotten now what the distance is from the poplar trees. I know that point was coincident to the survey made by Mr. Von Geldern. Mr. Von Geldern gave me a little sketch of his notes, and I checked them out. I did not make any survey of the land lying west of the present artificial channel of Feather River; I did not [79] survey that portion for the reason that it was impossible, everything was under water; everything was submerged. I do not know when that channel was cut through there. The river bends about at this portion; that is, where the old channel used to bend; there is a cut-off there. I did not measure the distance of the old bend of the channel from the northeast corner of the ranch. It seemed

(Testimony of H. H. Jones.)

to be several hundred feet to the west of the east line. I did not go over the cut-off across the river. There was water on the land west of the artificial channel of the Feather River at that time, which was in April. The river was a little high. I was there five days. As to the lines on the south of the Scheiber property, I took them mainly from the description, also with the assistance of Mr. Peter, and also from talking with Mr. Duff. A description will point out the lines. Yes, a description will furnish the starting point. A good description will locate the starting point. A description would refer to a corner or post at the end of the line, that measuring between would coincide with the description. I found such a post. I did not use the west line of lot number 2 as a basis; I was able to locate it from my survey. I have got marks on that map which includes the west lines of lot 2 of New Helvetia, as far as it coincided with the new description. I endeavored to locate it upon the map of New Helvetia in the records and could not find anything satisfactory to base my survey on, so I used a more satisfactory survey to pass on my survey. The description which I had was the description in the deed from the Scheibers. The description which I had and used was the description in the deed from the Scheibers to Miss Garwood. One of the calls of that deed calls for a line running on the west line of lot 2 of New Helvetia. I did not find out where lot 2 of New Helvetia was, and I have not [80] indicated it on my map. The man who helped me and

(Testimony of H. H. Jones.)

who was one of the persons who pointed out the boundaries was a man by the name of Peter. I believe his initials are H. A.; he lives at Nicolaus. I stayed at his house for five days while I was making the survey. I do not know how long he has lived there; he told me it extended over a long number of years. I will not admit that my map does not correspond with the description of that deed of lot 2 of New Helvetia; it is correct as far as lot 2 of New Helvetia is concerned. I do not know whether the west line of lot 2 of New Helvetia runs on a north and south course. The description may be incorrect. I have simply followed the description there, and it shows just a portion of lot 2 of New Helvetia. I endeavored to locate New Helvetia and could not find it on any map, or anything to base a survey on. I found a fence line on lot 2 of that land, between Drescher's and Saylor's. I took a starting point between Saylor's and Drescher's and took the description as indicated on the map. I do not know where lot 2 of New Helvetia is located. I did not look it up any further when I could not find the thing of record. Yes, sir, there was a well-defined fence around the tract all the way. There was a place where there was nothing but fence posts along the line. That was up in the northwest corner. The fences were somewhat irregular, just wandered around and looked like somebody stuck it in. That was on the west side of the channel, on the left bank of the river. Yes, sir, on the left bank of the channel. There are no fences anywhere between the

(Testimony of H. H. Jones.)

two levees. I followed the approximate center line of each levee, with the exception of the large levee. Owing to the slope being different on the one side than the other, I was a little close to the big levee. No, sir, the big levee was not pointed [81] out to me as being the boundary of the land. I was compelled to take that. There was a fence all the way around this property. My lines ran right along the fence. There was a very well-defined fence on the river side of that road. I took that for my line and followed that in, and that line coincided with the outside of the road all the way. When proceeding from the levee on the southwesterly boundary line, I went along on my right-hand side of the road; that was the case right down to the quarter section all the way down. The road on the southwesterly boundary line of the ranch was entirely on this ranch. The road is 40 feet wide. There are 6.8 acres covered by the old levee. Yes, I estimated the number of acres covered by the new levee; the area of ground covered by the new levee is 10.41 acres at the water line of the river at that time. The area of the land lying between the two levees; that is, from toe to toe is 60.068.

The COURT.—Q. How do you reconcile that with your previous statement that there was 73 and a fraction acres between the levees?

A. I think he asked me that question in gross; that is, what was contained in that piece including the levee.

Q. Both or one of the levees?

(Testimony of H. H. Jones.)

A. I ran a certain line and computed a certain area. That would lie between the lines; that area between the lines and the area outside of my lines was 73 and some fraction, I believe; and this time he asked me for a net amount between the toes of that levee and there is some deduction to be made, of which amounts net to 60.068. If you will take the second figure from the first figure that will give the area of the levee.

Q. No, you have a difference of three acres?

I followed the meanders of the old levee from where it intersects the northeasterly boundary line of the ranch to the point where [82] it intersects the westerly boundary line. Any portion of the land outside of the old levee was completely cut off from the other portion by the levee, and if you should wish to go from one portion to the other you would have to go over the levee. I found some cleared land where the two levees converge; that is, at the lower end where they come close together. I surveyed the area of this land and found that there were 4.91. I noticed the character of the territory lying between the two levees; it was practically submerged. At the time I saw the land there was very little of it above water, and such as was above water, was covered with blackberry vines, and a very dense impenetrable jungle, and on the east side of the property along the levee there was an open pond of water running towards the west where there was some little high land, but besides that appearing over the water was one impenetrable jungle; which no

(Testimony of H. H. Jones.)

one could get through unless they had an ax to cut their way. Practically 8 per cent of the land had this impenetrable jungle; all the rest, lying between the two levees was open water; all except the cleared portion and the portion where there was an open pond. The cleared portion was slightly higher; that is the 4 and a fraction acres. Standing on the northeast corner of the ranch, where the old levee crosses the line, you can see across the pond of water. When I saw it it came up to the base of the trees on the other side; I should say it was 300 feet wide. The rest was just a jungle. That was the barrow pit made from making the levee. It may have been over the barrow pit. This was open water until it came to the forest, and it probably went into the forest too. Yes, I know that there was water beyond the barrow pit; I could see it. I do not know how deep it was. [83] I could see to the jungle; the water was so deep I do not know how deep the trees were standing in the water in the jungle. On the east side of the artificial channel, where the major portion of the ranch lies, the land had a fence around it. There was no fence on the northeasterly side of the ranch between the two levees. There was a fence on the southwesterly side between the two levees where the levees come close together; there was a barb wire fence there; it was intended for a fence, but it was not on the line at that point. There is a line given in chains in the description. From the back of the town of Nicolaus, down towards the river, 80 chains. That is, from this line up to

(Testimony of H. H. Jones.)

the northeast corner. I computed the acreage in the artificial channel and there was 62.957 acres. There was a large new levee just finished in the last two years, and there was the old levee at the west portion of the ranch, which ran to within 175 to 200 feet of the new levee. The levee is on this side; I did not cross to that side. There may be a small levee over there, but I did not go over there.

**Testimony of Albert J. Peter, for Plaintiff.**

ALBERT J. PETER, a witness called upon behalf of the plaintiff, testified as follows:

My name is Albert J. Peter. I reside at Nicolaus in Sutter County, California. I am familiar with this land, which you have just been talking about; that is, the ranch now owned by Isabell Garwood. I know it to be the ranch, which previous to the time of her owning it, was owned by the Scheiber brothers. I was born and raised right there. I am acquainted with the witness who was just on the stand. I met Mr. Jones when he came up there to survey; I assisted him in surveying the ranch. He went around that ranch; I went with him. It was the Garwood land that we surveyed; I am familiar with the property. [84]

**Testimony of T. J. Mulvany, for Plaintiff.**

T. J. MULVANY, a witness on the behalf of plaintiff, testified as follows:

My name is T. J. Mulvany. I reside at Nicolaus in Sutter County. I have resided in Nicolaus about 35 years. I am familiar with the land now owned by the plaintiff in this case. I have been familiar

(Testimony of T. J. Mulvany.)

with that land for about the same time that I have lived there. I have lived there since '77, which is a little longer than 35 years. In 1911 there was no new levee there, it was all subject to overflow when the river was high. I think about two years later a new levee was constructed along the river for the purpose of keeping the water off. The land is all subject to overflow during the winter months when the water was high, and during the summer probably as late as May. That land to my knowledge, within the time that I lived in the neighborhood, has never been used for agricultural purposes; it is wild, half covered with timber, sycamore trees, cottonwood, grape vines and along the river it is filled up with sand. I never knew of any cultivation of any kind on that particular piece. This new levee was not in existence in that year; it has been constructed since. I think it was constructed in 1913; around that time, 1913 or '14. I am positive, however, it was subsequent to 1911. The land outside of the levee is known as overflow land. It would not be possible to raise alfalfa on that land unless it is protected from the water and also cleared. The part that is now reclaimed by the new levee is yet subject to overflow from seepage. There are large portions of it, may be 10 acres or so, that have been excavated in building the old levee, and it was hauled out in times, probably six or eight feet deep. It would cost more to fill than it is worth. There is some good soil in there if filled. To remove the sycamore trees and grape vines, and put that land in

(Testimony of T. J. Mulvany.)

condition for [85] *for* cultivation, it would probably cost more than it is worth. As far as the levee is concerned, it is protected from overflow now. The alfalfa would not last at all; the water was several feet deep then. Maybe in June, if the late crop could be put in, it might grow—that is, provided, of course, the land was clear, because there was some good soil there. Until recently I have been the reclamation trustee of the district in which this land is situated.

**Testimony of Harry K. Brown, for Plaintiff.**

HARRY K. BROWN, a witness called upon behalf of plaintiff, testified as follows:

My name is Harry K. Brown. I reside in Woodland in this State. I visited the dairy farm, owned by three brothers by the name of Scheiber, in Sutter County. I cannot give the exact date of the first visit. I went up there once with Mr. Dike of the California Colonization Company some few weeks before the time I visited it for the purpose of getting an option on the place with a party who lived in Fresno, who was with me at the time. My second visit was on the 4th day of July in the year 1911. My purpose in visiting the ranch at that time was to obtain an option to sell it. I made all the arrangements as to the price of the land, the price of the hay, the price of the stock, and the parties promised to go to Sacramento the next day. They told Mr. Dike they would not give the option to me, but they made all the agreement to go to Sacramento and give the

(Testimony of Harry K. Brown.)

option to the California Colonization Company. They said there were 600 acres to the ranch; they said they would ask \$125 an acre for it; those were the terms that they put the place up to me,—600 acres at \$125 an acre.

At this point the witness was temporarily taken from the [86] stand, and Mr. A. L. Crane, a witness for and on behalf of the plaintiff, was called for the purpose of showing that plaintiff could not produce the written memorandum of the agreement between the vendors and their agents. A. L. Crane testified as follows:

**Testimony of A. L. Crane, for Plaintiff,**

My name is A. L. Crane. I reside at Applegate in this State. In 1911 I was the president of the California Colonization Company; I received a subpoena from this court directing me to come here and bring in the records, documents and all papers of the California Colonization Company in connection with this case. I have not done so; I do not know where such records, documents or papers are; I have no knowledge of them. The last time I saw them was in December, it was December 28th or 29th of 1911; from that time I have had no connection with the company. I do not know at what place or whereabouts the Court can obtain those records. Mr. Dike is the secretary of the company; Mr. Dike is at the present time in New York.

**Testimony of Harry K. Brown (Resumed).**

I have seen the written option. I was with the Scheiber brothers when they signed it. The written option was given and signed by the Scheiber Brothers in my presence for 600 acres of land at \$125 an acre. I do not think it said anything about the levee. I could not say the technical terms of it, but the substance of it was that we were to have the privilege of selling that land. The option read 600 acres at \$125 an acre, and we were to have 5 per cent commission for sale of same. It was taken in the name of the California Colonization Company; it was typewritten; it was written in the office of the California Colonization Company. I think Mr. Dike wrote it, or one of his stenographers. I could not say positively which one. I saw it [87] before they signed it. It gave the exclusive right to sell at \$125 an acre for 600 acres of land with 5 per cent commission to them for their obtaining the purchaser. It constituted the California Colonization Company, their agent, to sell that land at a given price, and represented that the place consisted of 600 acres. It was executed on the 5th day of July, 1911, for the period of 30 days with the privilege of extension. In September, 1911, while at Berkeley, I received a telephone communication from Mr. Dike, the secretary of the California Colonization Company in Sacramento, with reference to the land. He telephoned to me from Sacramento on the evening of the 20th of September—Wednesday, September

(Testimony of Harry K. Brown.)

the 20th. Mr. Dike was the secy. of the California Colonization Company. He wanted me to come to Sacramento; he said he had a purchaser for the Scheiber ranch and he wanted me to give them the details. It was Wednesday evening, September the 20th, while I was at dinner, probably about the hour of 6:30 P. M. Mr. Dike wanted me to come to Sacramento; he said he had a prospective purchaser for the Scheiber ranch, and he wanted me to be sure to meet them and go into the details of the said place. I am positive it was on Wednesday night, September the 20th, that I received the telephone communication. The next morning at my office with the firm of Baker & Hamilton, I wrote this letter and my stenographer wrote them a letter from this copy. On the following Saturday afternoon I went to Sacramento in response to their summons. I remember the date, it was the 23d. I had told them I could not come until Saturday afternoon, at which time I would be through with my work. I left on the 12:30 train and met them at Dixon. Miss Garwood and Doctor Ramos I had never met before; I met them at Dixon. They had a machine, and we then went to Timm's Dairy, and then on to Sacramento. [88] That night after dinner we met—at the meeting after dinner there were present, Mr. Dike, Mr. Crane, Doctor Ramos and Miss Garwood and myself; five of us. We talked about what could be done with this land. We represented to Miss Garwood that this land was particularly adapted to alfalfa and dairy business and that there were 600 acres of it.

(Testimony of Harry K. Brown.)

Mr. Dike made these representations, my best recollection is. He said that the land consisted of 600 acres of the very finest alfalfa land. It was stated to Miss Garwood by all three parties at that meeting that she could not obtain anything better in alfalfa, than it was—than those 600 acres. There was nothing said about any of the land not being as good as some of the rest of the land. As far as I remember it was all represented as being uniformly of the finest kind, first class.

Mr. MACOMBER.—Q. In reference to whether it was a sale of the whole, that is acreage, or whether it was a sale in lump, or as it is called a sale in gross, what was said in that respect, Mr. Brown?

A. Well, it was to be sold as a total providing they took the stock.

Q. I am not asking you anything about the stock. I am asking you was it put to her as a sale in gross, or was it a sale at so much per acre?

A. The whole amount at \$125 an acre.

Q. That is what I am getting at. It was put up to her and talked to her as \$125 an acre?

A. Yes, sir. I had been on the property; I had been all over the portion inside the levee, over the place as far as it was shown to me; as far as I knew it. It was shown to me by one of the two men sitting on the left there (pointing), I don't know his name. One of the three brothers—not Morris, one of the other two went with me over the place, and then we all three together on the 4th of July in the afternoon under the shady portion [89] of the

(Testimony of Harry K. Brown.)

house talked it over, part of the time in German and part of the time in English. I don't speak German, but my wife does, and we knew all what was said. They mentioned it as 600 acres of land; the land was at \$125 an acre, and they would pay five per cent commission. Speaking of the quality of the land, they said there was nothing better as a dairy ranch. They took me over the place, they did not show me anything behind the levee. They said there was a little point outside where they obtained their firewood from; what it was I do not know. They did not say anything about the quantity. I understood them to claim that they had 600 acres under cultivation at that time; that is my recollection. I understood, 600 acres.

Cross-examination.

Yes, sir, I was on the Scheiber ranch about the 4th of July, 1911. I have had occasion to recall that conversation since that time, because after we had sold the property to these people they wrote me a letter at once wanting me to take the management of it. I then went back to the place and to arrange for the stock and wanted Scheiber to stay there a little until we could get men on the field to take care of it. I had a suit myself against the California Colonization Company for this commission, where it was reminded first and forcibly. They denied that I had been there, and I showed conclusively that I had been there. The Scheiber Brothers denied in that suit that I had been on the ranch;

(Testimony of Harry K. Brown.)

the suit was in court for two years; it was decided nine months after it started. It started in 1913. It was placed in the hands of an attorney in 1912. The exact year I am not sure of. I was in court something like two days. I have all my letters relative to that conversation. I cannot answer as to when [90] I first or last had occasion to recall that conversation with the Scheiber Brothers on July 4th, 1911. This is one time I have had occasion to recall it. Then when I had my own trial, there—I think that was in 1913—there was \$875 commission due me, and they contended it was paid to Doctor Ramos at that time. In the conversation of July 4th, they told me that there was a place across the levee where they got their firewood. They said nothing about the Feather River being the boundary of the land; I do not recall any positive conversation on that line; I do not recall any conversation about that. As to my business, I have been farming part of the time, and most of the time I have been in the hardware business. I have been brought up on a farm. When we were on the Scheiber place on the 4th of July, 1911—we got there quite early in the morning, probably 9 o'clock, and we were there until late in the afternoon. We were there trying to get a contract to sell the land. They said it was absolutely their price; if you sell it for that all right; it was \$125 an acre. I do not know whether the contract given to the California Colonization used the words \$125 an acre, or \$75,000 for the land. My best recollection is that it said \$125 an acre; it may have

(Testimony of Harry K. Brown.)

said \$75,000, I would not swear to it. I do not know that it contained the figures \$75,000. As to whether is specified 600 acres more or less, I could not swear to it. No, I did not make any division estimating 600 acres at \$75,000 was \$125 an acre. No, I did not. I saw the option when they signed it; the Scheiber Brothers signed it. I was present, yes, sir. I saw it when they finished. Yes, I think I read it; I am pretty positive that I did. I would not swear whether the contract said so much an acre, or \$75,000. I do not recall whether it said 600 acres [91] or 600 acres more or less. It was on the 23d day of September, 1911, that I had the conversation with Doctor Ramos and Miss Garwood. Yes, sir, it was on the 23d—on Saturday, the 23d. Dike was there, going over to Sacramento from Dixon, and then that evening Mr. Crane was there with us, and we were all there together. That evening—Saturday evening. I did a great deal of the talking, yes, sir; not all of it. My name was not mentioned in the contract between the Scheiber Brothers and the California Colonization Company. I was not an officer, or director, or employee of that company; I was only working with them on this particular sale, upon a contract with them, which was made upon the next day, before I returned to San Francisco, or possibly that night.

Q. You mean the 24th of September?

A. I have the letter that I can show you, The contract was made with me after the option, as you term it, or contract was signed. I had a contract with

(Testimony of Harry K. Brown.)

the California Colonization Company, made about the 5th or 6th of July. It was made in duplicate and signed by U. L. Dike, Secretary of the California Colonization Company. The first contract between Dike and the Scheiber Brothers, or between Scheiber Brothers and the California Colonization Company was for 30 days, but it was renewed according to the letter I received. I do not think it was ever renewed in writing. I think the same contract was renewed between Scheiber Brothers and Dike.

#### Redirect Examination.

I brought a suit against the California Colonization Company afterward to obtain my half of the commission according to the contract with them for the sale of this land. [92]

#### **Testimony of A. L. Crane, for Plaintiff (Recalled).**

A. L. CRANE recalled by the plaintiff, testified as follows: I was president of the California Colonization Company; Mr. Dike was the secretary and treasurer. It took two signatures to sign checks. There were three members of the corporation; myself, Mr. U. L. Dike and Mr. Green. There were no other members to the corporation, just us three gentlemen. We three composed the corporation; it was duly incorporated. During the time of this transaction Mr. Green was away in Oregon. I perfectly remember the circumstances of Miss Garwood coming to our place of business. She stated that she was going to bring a man to us, and that she would not look at anything before she had this man with

(Testimony of Harry K. Brown.)

her. She said she would not buy anything without his passing upon it. She afterward brought this gentleman to our office. At the time she introduced him to us she said he was her agent; she said that he would be her advisor, and she also said her relations with him would be much closer, I believe she was to be married to him; she said she was engaged to him; she told me that. The first day we went out with Doctor Ramos we took him to Andros Island to Cutter's Ranch; that was down the Sacramento River. Mr. Bucholz, Dr. Ramos, Miss Garwood and myself made up the party. Dr. Ramos did not think the property I showed to them was large enough. On the way back Mr. Bucholz suggested they look at the Scheiber Brothers' ranch. When we got back from our trip I introduced Dr. Ramos to Mr. Dike, who was familiar with the Scheiber Brothers' ranch. I had no knowledge of it, I had never been upon it. I told them that that ranch was Dike's best scheme, and that he thought more of it than any other property in our territory.

Q. How was that land put up to Miss Garwood, or how was it represented in reference to quantity?  
[93]

Mr. HEWITT.—Objected to on the ground the time, place and parties present are not stated.

Mr. MACOMBER.—Q. At the time she was present and put up the earnest money and signed the contract?

Mr. HEWITT.—Objected to as being two different times.

(Testimony of Harry K. Brown.)

The COURT.—Sustained.

Mr. MACOMBER.—Q. What was explained with reference to the quantity of land?

Mr. HEWITT.—Objected to as being indefinite in time.

The COURT.—Overruled.

A. My understanding was 600 acres.

The COURT.—Q. You were asked to state what was said to Miss Garwood?

A. I did not present this piece of property, Judge.

Q. You must not tell what the understanding was. Read the question, Mr. Reporter.

(The reporter read the question.)

A. Bucholz, the driver, made the first statement.

The COURT.—I will sustain the objection to that. There is no relation shown.

Mr. MACOMBER.—Q. Did Mr. Dike ever in your presence make the statement—what was the agreement or understanding when that land was sold her, was it in gross or acreage?

A. My understanding was it was to be acreage.

Q. How much an acre? A. \$125.

Q. Is that the way it was represented to the plaintiff?

The COURT.—Q. If you know?

A. I could not swear that. I think it was.

Mr. HEWITT.—I move to strike out the witness' understanding.

The COURT.—What he thought it was may be stricken out.

Mr. MACOMBER.—Q. Don't you know, as a mat-

(Testimony of Harry K. Brown.)

ter of fact, Mr. Crane, [94] as to whether or not that land—if the Court please, I do not want to lead the witness as you admonished me not to do so. Mr. Crane is between the devil and the deep sea, so to speak.

The COURT.—That will not prevent him from stating his best recollection of what was said.

Mr. MACOMBER.—Wouldn't it be permitted to lead some?

The COURT.—I do not think you need to lead Mr. Crane. He is intelligent enough. I do not think it is necessary.

Mr. MACOMBER.—Q. What was said to Miss Garwood in reference to what that land produced?

Mr. HEWITT.—That we object to, if the Court please, on the same theory that we made the objections in the other case, as being a matter of opinion, the producing quality.

The COURT.—I will sustain that objection. That calls for a statement made by anyone present, whether it was shown to be an agent, subagent or stranger to the transaction.

Mr. MACOMBER.—Yes.

The COURT.—You will have to confine your testimony to those who were directly connected with this transaction. Some stranger to this transaction may have expressed an opinion as to the acreage or character of the land and certainly it would not be binding upon these defendants. You have got to connect the defendants with these representations in some way.

(Testimony of Harry K. Brown.)

Mr. MACOMBER.—Q. Mr. Crane, you were present, were you not, at the time this matter was discussed between the Doctor, Miss Garwood and yourself and Mr. Dike?

A. Very little of the time.

Q. You know, as a matter of fact, what the land was said to produce? A. Alfalfa.

Q. What was said by yourself and Mr. Dike with reference to the quality of alfalfa land?

A. We considered it first-class [95] alfalfa land.

Q. Was it not put up to Miss Garwood as first-class alfalfa land?

The COURT.—Q. State what was said?

A. I cannot answer that because I was not present during all Mr. Dike's talk.

Q. Don't attempt to say anything when you were not present. Only say what was said in your presence. A. Yes, sir.

Mr. MACOMBER.—Q. You were present, Mr. Crane, during the conversation held with Miss Garwood and Mr. Dike. What was said with reference to the quality; was it first-class alfalfa land, or good, bad or indifferent?

Mr. HEWITT.—We object to the question as being incompetent, irrelevant and immaterial, suggestive and leading and as calling for matters of opinion.

The COURT.—I will overrule the objection. I will admit the testimony subject to counsel's objection.

(Testimony of Harry K. Brown.)

Mr. MACOMBER.—Q. What was said?

Mr. MILLER.—Suppose we have the question read to the witness.

(The reporter reads the question.)

A. It was represented as being first-class alfalfa land by Mr. Dike.

Mr. MACOMBER.—Q. You know that of your own knowledge? A. Yes, sir.

Q. Mr. Crane, at what price per acre was that land put up? A. At \$125 an acre.

Q. As to the money which you had to pay to Dr. Ramos, was there any money given to Dr. Ramos?

A. By us, by the Colonization Company?

Q. Yes? A. Yes, sir, \$1500. [96]

Q. At what time was that paid?

A. After he made the first payment. He came out from the office where he was talking with Miss Garwood and told me they had decided to take the ranch provided we would split the commission; otherwise they would not take it. So we held a meeting of the organization and voted to give him one-half.

The COURT.—Q. Did I understand you to say Miss Garwood was present?

A. He was with her and left her.

Mr. MACOMBER.—Q. When he handed you this check for \$5,000 you handed him back a check for \$1500?

A. Not immediately. He came before that and we told him that we had to hold a meeting because it was a corporation.

(Testimony of Harry K. Brown.)

Q. When he gave you the \$5,000 you gave him \$1500 afterwards?

A. We returned him a check for \$1500.

Q. And Miss Garwood was in the other room?

A. He came from her.

#### Cross-examination.

We gave him a Colonization check in return. He came right from Miss Garwood and said that they had decided to take the place, provided we split the commission. Yes, sir, he said "we." Previous to that time Miss Garwood had asked us to split the commission several times. At the time we agreed Miss Garwood was present in the other office and Dr. Ramos came from her and said we are willing to take the place, provided you split the commission and we agreed to do it. I did not see the written contract between the Scheiber Brothers and the Colonization Company. I do not know the contents of that. Mr. Dike held all the contracts in the listing book. I got my idea of the 600 acres from the conversation we had in the office; it was always [97] spoken of as 600 acres; it was supposed to contain about that number of acres. Prior to the time we actually agreed to split the commission with Dr. Ramos, I was informed by a third party that they would make that demand. The party was C. E. Winerich. He said they had talked it over in his hearing and they were going to demand a division of the commission. In splitting the commisson, it was not our idea that we were cutting down the price to that extent, or in that amount. It is not cutting

(Testimony of Harry K. Brown.)

down the price. We were allowing it to the plaintiff. There was nothing at all said in any conversation that we had, as to the price in case there were more than 600 acres. The property was generally referred to as 600 acres.

Redirect Examination.

Mr. MACOMBER.—Q. Mr. Crane, the check that you gave Dr. Ramos the time he handed you the \$5,000, as you heretofore testified, that was made out to Dr. Ramos? A. Yes, sir, Dr. Ramos.

Q. And the check he gave you was made out by Miss Garwood?

A. Miss Garwood's check. We talked with Miss Garwood at the office of the California Colonization Company. She came in frequently. I did not converse with her very often; she talked with Mr. Dike about this property. We could not pay a check without it being a matter of record, it was a corporation. There was a resolution passed allowing this to be paid, half of the net commission. The gross commission was \$3600.

Recross-examination.

Miss Garwood negotiated about a month before Mr. Brown came up to Sacramento. Mr. Brown was not called in until the deal was practically closed. She was there about a month before Mr. Brown came. Miss Garwood was at the ranch twice, I [98] know, before the contract was made. That is, the machine went three times, but I think Miss Garwood went twice. Ramos went three times.

(Testimony of Harry K. Brown.)

A. L. CRANE, recalled for redirect examination. I never saw the contract with the Scheiber Brothers; it was on the listing book only. Mr. Dike went up and secured authority after we had found the purchaser. After we had secured Miss Garwood, he went up and got authority from the Scheiber Brothers. I do not know in what manner that authority was obtained; I know he did get authority. They consummated the sale. I could not answer what was done with the balance of that \$5,000, there being \$3500 left. The money was turned over to the corporation funds. The California Colonization Company sold the dairy farm owned by the three Scheiber Brothers in Sutter County. They received from the Scheiber Brothers \$3600 for the sale. That money was paid when the money was paid for the ranch. I do not remember how long a time it was after we received the \$5000 check; I was not the secretary. Yes, sir, there was some balance left from the \$5,000 after taking away the \$3600. I don't know to whom that was turned over. I think they paid us our commission afterwards. As I recollect the Scheiber Brothers gave us a check for \$3600. I do not know when they gave us the check; I never handled the money. They gave us \$3600 for selling that land. I cannot tell you anything about the funds.

**Testimony of Clinton L. White, for Plaintiff.**

CLINTON L. WHITE, called for the plaintiff testified: I never saw the books, papers or records of the California Colonization Company. I never

(Testimony of Clinton L. White.)

had them and don't know anything about them. Mr. Needham, one of the partners of our firm tried [99] the case brought by Mr. Brown against the California Colonization Company, and I never saw any papers or pleadings, and never was in court about it. The firm of White, Miller, Needham & Harber were the attorneys in that action. I never saw the papers and do not know that they ever handled them. I do not know anything about them. I do not know whether they ever had any papers. I might assist the Court in finding that record, I do not know. I suggest that Mr. Crane or Mr. Dike could give you some information.

**Testimony of A. L. Crane, for Plaintiff (Recalled).**

A. L. CRANE, recalled, testified as follows in redirect examination.

I did not handle this deal. It was my impression that the land was first class alfalfa land. Mr. Dike handled the deal entirely. Mr. Bucholz put it up to Dr. Ramos, and they discussed it in the machine coming back from the river. I did not say anything about it, for I was never on it.

Mr. MACOMBER.—Q. What was stated by Mr. Bucholz in reference to that land? What did he say?

The COURT.—Now, as I understand it, he was not the agent of the vendor.

Mr. MACOMBER.—We will show, if the Court please, that this agent received a percentage of this sale, this automobile driver, this Mr. Bucholz at this

(Testimony of A. L. Crane.)

time received a certain percentage of the \$3750 which was paid to Mr. Dike and Mr. Crane.

The COURT.—Do you affirm that you will show that he was directly or indirectly the agent of the vendors?

Mr. MACOMBER.—We will show that he would be what you would term probably indirectly the agent; that is, he was a subagent. We have authorities holding that representations made by subagents are binding upon their principal, just the same as if made by [100] the agent in chief.

The COURT.—I will admit the testimony with the understanding that you are to show in some way that this party was connected with the vendor. If not, it will not be considered for any purpose whatever.

Mr. Bucholz said he thought it was a fine proposition. My recollection is that he knew of a very fine dairy ranch. He said it was fine alfalfa land. He said it was his personal opinion. I could not give the exact words that he used, in reference to that land. He said, according to my best recollection, he knew of a very fine proposition up the river—a dairy ranch—and the doctor said he would like to look at it.

Q. Did he describe it further? What did he say?

A. I think he did go into it; as far as that is concerned, I do not know; I could not hear with the machine running along all the conversation that was carried on.

The COURT.—For the purpose of refreshing your recollection, I will permit counsel to ask a leading question.

(Testimony of A. L. Crane.)

Mr. MACOMBER.—Q. Was there not something said by you about a pet scheme of Mr. Dike's?

A. Yes, sir, I did.

Q. What did you say?

A. I said that was Mr. Dike's pet scheme. He said it was a very fine proposition.

Q. What else did Mr. Bucholz say with reference to the character of that land?

The COURT.—Q. If anything.

Mr. MACOMBER.—Q. Did he say he had seen it?

A. Yes, sir, he did.

Q. Did he say that he understood it, that he knew all about it?

A. My recollection is that he said it was a very fine property.

Q. What did he say about in what class the alfalfa land belonged, [101] as to whether it was good, bad or indifferent?

A. First-class.

Q. Did he say it was first-class alfalfa land, or did he say "I think it is first-class alfalfa land"?

A. That I do not recollect.

The COURT.—Q. Did he say how many acres there were?

A. Yes, sir, about 600.

Mr. MACOMBER.—Q. You cannot say positively now at this time whether he gave that as his information, his guess, his personal, individual opinion, or whether he gave the statement as being a fact?

A. No, sir, I could not.

Now, as to the \$5,000 check, it was given to Mr.

(Testimony of A. L. Crane.)

Dike, made out, as I remember it, to the firm, and Mr. Dike gave Miss Garwood an agreement to deliver the property, subject to the owners' approval. that is my recollection of it. Thereafter we gave Dr. Ramos a check for \$1500. If not immediately afterward, I should think it was pretty shortly after. I may have stated the other day that when he handed me the check for \$5,000 I handed him back a check for \$1500. I may have made a statement to that effect, but to the exact time, this is four years ago, and it is difficult to remember four years exactly, but we gave him a check afterwards, if not immediately. My recollection was that we gave Dr. Ramos a card stating that I would divide the commission with him. I think we did. I gave Dr. Ramos that card when he came from the little office where he had been conferring with Miss Garwood, and told me they would not take the property unless I divided the commission. So we held a little meeting, Mr. Dike and myself; Mr. Green was absent. We passed a resolution authorizing a division of the net commission, and then he asked for a verification, and we wrote it out on a card, [102] as I remember it. We never tried to conceal the division in commission.

Q. Did you ever tell Miss Garwood anything about it?     A. No, sir.

Q. You knew you were selling the property to Miss Garwood?

A. He was her agent. Ramos never said anything to me about working for his health. Dr. Ramos did not say to me that he would have to have some money

(Testimony of A. L. Crane.)

out of the transaction. At the time I gave him this *car*, I agreed to give him one-half of the net commission. Yes, sir. I would not state just how long it was after he gave us this check for \$5,000 drawn by the plaintiff that we gave him the \$1500 check. No, we did not hold the meeting and then give it to him. This meeting, as I remember it, this demand that he made was several days prior to the payment of that money. As far as the actual payment of the commission is concerned, I could not give you an exact answer as to how soon the money was paid to us. The money was paid to us, made out to the Colonization Company, as I remember it, and then we made it out as agents for the Scheibers, and then we made out a check for Dr. Ramos as agent for Miss Garwood. Now, the exact time between the transactions, I could not give you, but it was very shortly after.

Q. Before the money was paid, he made the demand? He made the demand before the money was paid?

A. Several days before. My impression was that Miss Garwood knew all about it.

Q. That is all right about that part of it. He made the demand for the division, and the demand was acquiesced in by you some days previous?  
[103]

A. Some days previous, because that was when they had agreed to take the property.

Q. As a matter of fact, the agreement for a division of the commission was made some days prior to

(Testimony of A. L. Crane.)

the date this \$5,000 was paid?

A. I think it was. There was an interval of several weeks from the first time they saw the property. I have not the days fixed firm in my mind as to when we went to the Sutter Ranch. I have not the day fixed in my mind as to when the \$5,000 was paid. It is my recollection that the agreement to divide the commission was made several days before the \$5,000 was paid. I do not remember how much commission was paid to Mr. Bucholz. Mr. Dike handled all the commissions.

Q. But there was some commission paid to Mr. Bucholz? A. I think there was.

Q. Don't you know there was?

A. No, sir, I do not.

Q. Didn't you state to me the other evening there was some commission paid?

A. There was a listing commission. Might I explain that, your Honor?

The COURT.—Yes.

A. A listing commission goes to the man who submits the property in a real estate office. There was a listing commission due Mr. Bucholz for submitting this property, and my impression is that it was paid.

Mr. MACOMBER.—Q. That is, that was your practice?

A. Yes, sir, that was the practice.

Q. And you did pay a commission to Mr. Bucholz?

A. Yes.

(Testimony of A. L. Crane.)

Cross-examination.

Mr. MILLER.—Q. Did Mr. Bucholz list this property with you? [104]

A. Inasmuch as this property—

The COURT.—Q. (Intg.) Answer the question. Did he list it with you?

A. He brought it up to the purchaser, and it was not in force, so we look upon it as a dead piece of property upon our books.

Mr. MILLER.—Q. Are you sure of that?

A. I am quite positive.

The COURT.—Q. I do not quite understand your answer.

A. Might I explain it, your Honor?

The COURT.—Yes.

A. As I recollect it, this contract had run out, was not in force.

Q. Which contract?

A. The original contract with the Scheibers, between the Colonization Company and the Scheibers. It was a dead property upon our books, and Mr. Bucholz brought it up and submitted it to Miss Garwood and Dr. Ramos.

Mr. MILLER.—Q. What do you mean, brought it up?

A. He was the one that suggested it to them.

Q. While they were in the automobile?

A. Yes, sir, so that afterwards they had to make a new agreement with the Scheibers, and for that reason he claimed some share in the commission. It is merely a technical term.

(Testimony of A. L. Crane.)

Q. You stated, in answer to counsel, that this was a pet scheme of Mr. Dike's?     A. Yes, sir, it was.

Q. As a matter of fact, Mr. Dike and Mr. Brown were trying to buy it for themselves?

A. Yes, sir, they were.

Q. Forming a corporation to purchase it for \$90,000.

Mr. MACOMBER.—Objected to as not cross-examination as to what they intended to do.

The COURT.—I sustain the objection.

Mr. MILLER.—Q. Do you know anything about this new contract [105] with the Scheiber Brothers. Did you have anything to do with the preparing of that contract, itself?

A. Nothing whatever.

Q. And you do not know its contents?

A. No, sir.

Q. You seem to confuse the payment of the \$5000 with the payment of the commission, I think. At the time that Dr. Ramrs came to you from Miss Garwood, and said that they would take the place if you would divide the commission with him, was it not that same day that the \$5000 was deposited with you?

A. I think not.

Q. And subsequently was not that check taken up and another one given, and deposited in the Fort Sutter National Bank?     A. I believe it was.

Q. Is it not a fact that you did not pay Dr. Ramos anything until several weeks later, when you actually received your own commission?

(Testimony of A. L. Crane.)

A. We received our own commission before it was paid.

Q. Then the \$5,000 check was deposited by you some time before you actually paid him the money?

A. Yes, sir.

Q. And you say there was some sort of a receipt or document given to Miss Garwood when she paid the \$5,000.

A. Yes, sir, there was a receipt, an agreement to deliver this property subject to the owner's approval.

Q. Did you ever see that document?

A. No, sir, Dike made it out.

Q. You do not know it then?

A. No, sir, I do not know it.

Q. What were the positions of the different parties in the automobile in that ride to Andros Island and back?

A. Dr. Ramos and Mr. Bucholz sat on the front seat, and I sat on the rear seat with Miss Garwood, that is, returning.

Q. At the time of this conversation?

A. Yes, sir.

Q. Do you know whether or not, as a fact, Mr. Bucholz did receive [106] any commission?

A. No, sir, I could not tell you. I did not handle the money.

Q. You know that he claimed some?

A. He claimed a commission.

#### Redirect Examination.

When he acted as a selling agent it was the practice of the Company to pay the chauffeur a commis-

(Testimony of A. L. Crane.)

sion on the properties that he would help to sell. All salesmen get a commission. I do not know if we did pay commissions to Mr. Bucholz. Mr. Dike handled all the commissions. There was some arrangement allowed him of a certain percentage on the sales he handled.

Recross-examination.

As far as I know, all that he did was to mention it in the automobile on that occasion. I do not remember of him saying anything at any other time.

**Testimony of Arthur E. Miller, for Plaintiff.**

ARTHUR E. MILLER, called by the plaintiff, testified as follows:

Our firm were the attorneys of record for the California Colonization Company in the action brought by Harry K. Brown against the California Colonization Company. We were the attorneys for that concern in that case. We represented them in their matters at times, not I personally, but Mr. Needham of the firm. We did not have anything to do with the books of the California Colonization Company,—not that I know of. I know that in that case certain documents and letters, etc., relating to the Scheiber Ranch were submitted to Mr. Needham and were offered as exhibits, and I have obtained those exhibits since I went back to Sacramento last Saturday. I have obtained [107] those exhibits. I knew nothing of them before, but I have them now. I have not the minute book, or the other books. I have not the slightest idea where they could be obtained. They were not among any of the California

(Testimony of Arthur E. Miller.)

Colonization Company papers in our office. I looked through all of them and found none of the minutes, except the exhibits which I have brought with me. I have the original authorization given by the Scheiber Brothers; the one they signed, authorizing the California Colonization Company to secure a purchaser. It is in the nature of an option with the right to sell and earn a commission. I do not know where you could obtain the other books and papers; I have no idea. They were never in the office that I know of.

**Testimony of Albert J. Peter, for Plaintiff  
(Recalled).**

ALBERT J. PETER, recalled by the plaintiff, testified as follows:

My name is A. J. Peter. I have lived in the town of Nicolaus and vicinity for 31 years. I am somewhat familiar with the soil in the vicinity of Nicolaus. I am familiar with the land that is subirrigated; that is, the land wherein the water seeps into it from the diver under the levee. I have had experience with land in that vicinity. I have farmed there. I have never farmed the Garwood ranch. I am familiar with the property belonging to B. F. Driver. That is one-half mile from the Garwood land; it is not closer than half a mile. The Saylor ranch lies directly east of the Driver place. Directly east of the Saylor ranch there is the Garwood land. I think it depends a whole lot on the soil as to how far the subirrigation extends from the river. If the soil is uniform it runs parallel with the river. When you go through the Fassler and Joseph Meise place, [108] the subirri-

(Testimony of Albert J. Peter.)

gation extends between one-half and three-fourths of a mile. The line of subirrigation, when you get down to the Redfield ranch, extends about the same distance from the river, or a little further. I am familiar with the elevation lines of the land there. I do not know whether the subirrigated land runs along the line of 32-foot contour. I do not know how the line of subirrigation ran, when compared with the 32-foot contour line. I guess that the subirrigation goes over the biggest part of the Saylor ranch; it hardly goes as far as the eastern end of the Saylor ranch. On the east side of the Borgman ranch there is a slough. I think the subirrigation goes clear out to that slough. I think the biggest part of the Borgman place is subirrigated. I am not sure; I never farmed any of it. The subirrigation extends, I judge about one-half or three-fourths of a mile. It all depends upon the soil. Some of the soil is heavier than others, and does not let the water come through. If the soil is of a clay nature, it does not let the water rise to the surface. The Driver place was formerly owned by our family. That place was entirely subirrigated. Speaking in reference to the Redfield farm, lying just north of the Garwood place, and speaking of the Saylor farm, lying just south, the subirrigation when between one-half and three-fourths of a mile from the river,—probably a little further. I should judge that it took pretty close to all the Saylor place, except a little piece on the east end. I do not think that the portion of the Garwood ranch, which is the northeast quarter of Section 24,

(Testimony of Albert J. Peter.)

is subirrigated. I have seen this land at the rear end of the Garwood place overflowed. I have seen it overflowed a week at a time. I have seen it overflowed longer than that, before the reclamation. Before reclamation I have seen the water over it [109] for a month at a time, I guess. This reclamation was done within the last two or three years, and since that time this land does not overflow. The reclamation reclaimed the back land of this particular piece of property. That is, it kept water from backing up or coming down on top. The back end of this particular property is now free from water.

#### Cross-examination.

The Borgman ranch is located southwest of the Garwood property. It is farther from the river than some of the Scheiber property. It is farther away from the river than the portion of the Garwood place which is right along the river. The Borgman property does not join the northeast quarter of Section 24, of the Garwood land. The Borgman property is west of that quarter section; it does not adjoin. The Redfield farm is north from the Borgman property; it adjoins the Garwood and Scheiber property. The Saylor ranch lies right south of the Garwood place. The eastern line of the Saylor ranch does not extend as far easterly as the east line of the Garwood property—by about one-half mile. I said all of the Saylor ranch but one corner was subirrigated. I do not know how many acres there are to the Saylor ranch. The land in the rear sometimes overflows a month at a time. It was in the winter-time, the time of high

(Testimony of Albert J. Peter.)

water. Yes, I have known it to overflow without any levee break; the back-water of the Sacramento River. The back-water of the Sacramento River has extended over that land from three to four weeks at a time, I guess it has. The biggest part of the section would be covered—the northeast quarter, yes, sir. Some of the Borgman property overflowed at the same time. Some parts of the Borgman property would be overflowed about the same length of time. Some parts of the Saylor property would be overflowed at the same length [110] of time. I could not say how many times I have ever known the land to be overflowed a month at a time. I have known it to be overflowed for a month at a time more than twice. It was overflowed in 1907 and 1909. Those are the only two years I have known it to be overflowed more than a month. I cannot recall exactly. Those years 1907 and 1909 were extremely high water, all through the Sacramento Valley, and I guess a large portion of the Valley was submerged at that time. The reclamation districts were formed within the last two or three years. I do not know when the district was formed. The work was done in the last two or three years. The plan of reclamation along the river consisted simply of raising the levees. At some places the subirrigation extends further than others, it all depends upon the soil. When I said subirrigation extends from one-half to three-fourths of a mile from the river I had in mind the distance at a right angle from the river. It may exceed that a little in some places. At the Garwood

(Testimony of Albert J. Peter.)

place, I figure the distance to go from the levee. When I say one-half to three-fourths of a mile on the Garwood place, I mean from the old levee.

**Testimony of I. N. Scammell, for Plaintiff.**

I, N. SCAMMELL, called for the plaintiff, testified as follows:

I reside in Walnut Creek. During the latter part of 1911 and 1912 I had charge of Miss Garwood's ranch at Nicolaus. That is the ranch concerning which this controversy is over. I had occasion to observe the character of the soil; I ran a ranch five years prior to this. To a great extent I understand the various classifications of soils and their character. I understand what is meant by subirrigated land. I know what is meant by river-bottom land. I understand what is meant by sandy [111] sediment loam. I understand what is meant by clay loam. I understand the difference between soils when rich and soils that are poor. I have a remembrance of the character of the soil of this particular ranch in 1911. I know the conditions of this particular ranch with reference to subirrigation. I know what the conditions were at the time I was there in respect to overflow at the rear end. At the time I was there, I took notice of what land was subirrigated, and what land was not subirrigated. I had reason to observe it while cutting the hay there. I know positively what land was subirrigated, and what land was not subirrigated. The land that was subirrigated land ran back from the river, approximately to the house. It is not a straight line, toward Striplin Station it ran

(Testimony of I. N. Scammell.)

back a little further. I recognize that map as the map of this particular land. That is the shape of the ranch. I can make a mark here showing where those houses were. (Witness does so.) That mark which I make indicates the location of the ranch house. (Witness draws a line to indicate according to his idea how far the subirrigation goes, and marks "A" at one end of the line and "B" at the other end.) The subirrigation extends from the river to that line. You could raise alfalfa on the subirrigated land, but on the other, there was some of it planted in alfalfa which would raise a good first crop, and not so much in the second crop; it petered out. It did not give your four or five cuttings; as the front of the ranch did toward the river; that part of the ranch was used for pasture, and they told me that it had not been planted in alfalfa. Some of the land just back of the house would raise a first crop. There was approximately a ten-acre field [112] in here that was planted, and a part of it would show the subirrigation, and a part would not. I was speaking in answer to his question about the land across the road; the 160 acres, which had never been planted in alfalfa. I didn't plant any alfalfa when I was there; it was there when I went there. The alfalfa looked fine the first and second cuttings, and on some of it you would get a third cutting. That was the dividing line between the subirrigated and the other land; between the subirrigated and the non-subirrigated. The alfalfa would come up four or five inches and go to seed, and the other on the subirrigated side would

(Testimony of I. N. Scammell.)

grow up to its regular height and make hay. During my time on the place the alfalfa on the non-subirrigated side remained in the ground and came up the next year. I never estimated the number of tons to the acre that particular portion would produce. I can recall how much it would produce, because I know how much the first and second cuttings would produce. The first and second cuttings produced approximately three or three and one-half tons. The first and second cuttings are the heaviest. The first couple of cuttings were the same on the subirrigated and non-subirrigated. The non-subirrigated produced about three and a half tons to the acre. In respect to the overflow of the back end of the land, the year I was there was an extremely dry year, but the water did get along on the back acreage and stayed there, I should say, probably four or five days at one time. I do not remember what month it overflowed, but I know that it did overflow. I saw the riff-raff that the flow carries with it on the fences, which was much higher than the water went the year I was there. When I cleaned out the cheese-house there was filth and mud on the cheese-house floor and on the bottom shelf. I know how many acres there was supposed to be to the ranch. I could only guess how [113] many acres clear and level for pasture. I am familiar with the northeast quarter of section 24. No portion of that was subirrigated. The portion of the land immediately north of the quarter section, possibly 50 acres, is not subirrigated. There might not be as much as 50 acres. The soil at that

(Testimony of I. N. Scammell.)

end of the ranch was very heavy and from the weeds that grew on it, I would judge that it was sour. By the term sour, I mean the land would have moisture on it, but it was very dense land, and it was a kind of clay. That is not the best land for alfalfa. That is the general character of the land below the line which I have drawn indicating the line of demarcation between the subirrigated and non-subirrigated. I did not say that there were 50 or 60 acres out of the 600 that was non-alfalfa land; I said that the 160 acres was of that kind of land, and then there were 50 acres across the road, making approximately 200 acres not susceptible to subirrigation. Yes, I am familiar with the other end of the ranch. I first went on the ranch early in November, about the 9th of November of the year 1911. I was there about nine months, maybe ten months. At the time I was there the new levee had not yet been built. At the time I was there they had not commenced it. The land lying northwest from the old levee was covered with very dense timber. It was subject to overflow, and, in fact, water stood all the year around in places on it. The old levee did not extend across the ranch. The levee is as it is shown there (indicating on the map); I know of the land belonging to plaintiff to the river line. I do not know of any land across the river belonging to this place. I was there about ten months. Alfalfa could not be raised on the land outside of the old levee. The land outside the old levee could [114] be prepared for alfalfa. The land had big holes in it in places. You could walk

(Testimony of I. N. Scammell.)

through there in places in the summer time. You would have to break your way through. You could not go through there in the winter time,—it would be full of water, not all winter, but during the flood times. I took photographs on the ranch while standing near the river, and looking in a northwesterly direction. I have such a photograph with me. It was probably taken in April or May. The water at that time was ordinary. This picture is of the land or landscape lying in a northwesterly direction from where I was standing on the river bank. I was standing on the river bank about three-fourths of the way from the northeasterly boundary line, and looking in a northwesterly direction, right across the river, there was a bend in the river here. I did not know the plaintiff owned any land over in that direction. (This picture is in evidence, marked, "Plaintiff's Exhibit 1.")

#### Cross-examination.

Yes, I was on the Scheiber ranch about ten months; I went there about the 9th of November. The Scheiber Brothers were on the ranch at that time. They remained there and farmed the ranch until the first of December. I was getting my hand then during that time. All my information concerning that ranch was gleaned in the ten months I was there. I was never on the ranch before, and have never been there since. The residents told me the winter I was there was an extremely dry winter. I have no knowledge of that portion of the ranch, which is the northeast quarter of section 24 ever having been planted

(Testimony of I. N. Scammell.)

in alfalfa. It showed no indication of having been planted in alfalfa. Some of the land belonging to the Garwood property over the road adjoining the quarter section showed evidence of having been planted in alfalfa, there was [115] alfalfa growing there at that time. I cut it. It was on that ten-acre flat. It was approximately ten acres. That was the only land on the other side of the road, near this quarter section, that had been planted, as far as I could observe—the ten acres. As to the picture I took, I did not take it from the levee. I took it right from the bank of the river. There was only one channel there when I was there. I crossed the river at times. I do not know anything about an artificial channel. All I know is, I stood on the bank of the river and took the picture. I stood on the ranch side of the river. I did not stand on the levee, I was clear down to the river. There was an old levee there; there was a bar right in and I walked down this levee here and walked off on to that portion and stood on the bank of the river. I walked over the old levee and down to the other side of the levee, and walked over to the water and took the picture. I could walk over the levee there, but it would take a long time. Water would not prevent me from getting through it. When I took the picture the camera was pointing down the river and across. The river had a bend there and went around this piece of land which shows. I took pictures of the ranch to send home. I did not know anything about any litigation. The land in the picture represented

(Testimony of I. N. Scammell.)

land across the river. There was a sand-bar where we went swimming. I did not identify it as belonging to anybody. I did not know whose land it was. From what I have since learned here I have learned whose land it was. From what I have learned here I understand it to be some of the land of Miss Garwood. The tract of the land on the other side of the river has trees. I have been over it at the time I was up there. [116]

#### Recross-examination.

I ran a dairy ranch for Mr. Berges in Contra Costa County for five years. I was with him six years prior to that on the same ranch in Contra Costa County. It was high land, quite high. There were hills in connection with the ranch, but there was a big flat. It was alfalfa land. Speaking of the drift on the fences there, I am speaking of the back fence on the back of that 160 acres. I do not think there had been any floods, or high water from the first of November, or first of September, up to the time I went there. At the time I went there, there had been no rain recently. There were not any floods at that time. I am 28 years old. Yes, there was mud on the floor of the cheese-house in among the shelves. They told me that it was deposited there in flood time when the levees broke. Just from looking at it, one would judge so. Probably the levee broke somewhere in the district, and flooded the cheese factory. I guess that was an unusual year, and levees broke. That was my first experience in a levee country. They surveyed and were building the levee when I

(Testimony of I. N. Scammell.)

was there. I saw stakes; they may have surveyed it before I was there. I saw stakes down the river. There was a gang around there after I was there. When I took the picture the camera was pointed towards the bend; it was pointed across at this sand-bar; it was a little down and more across. This white streak here represents water. That which seems to be a little brush, is the reflection of the trees in the water. The sand in front here is sand in front of the trees. Here is the sand-bar that ran to the bend here, and here is the bend. The river went clear back around here again. These trees were on the same bank I was on. I was on the river right back of the levee, and I shot across that sand-bar. My camera [117] was pointed on the water line; I stood on the water line and pointed across the river. My object was to take a picture of the swimming-pool; that is all I had in mind at the time I took it. I cut two crops of alfalfa from some of that land that produced three or three and one-half tons to the acre. That was part of the piece I said contained about ten acres, and was directly across the road from the 160-acre piece. On the other part of the ranch I think we cut four crops that year. I cut the alfalfa until I saw it would not make another crop, and then we used it for pasture and turned the cows on it. We turned the cows on it after we let it grow up a ways. The cows did not run on the alfalfa land generally all the time. The platform of which I spoke, was in the grove.

(Testimony of I. N. Scammell.)

**Redirect Examination**

I could not say just what the condition of that particular place was during the month of April. The water would come up and go down according to how the rains were. The water would not be there during the greater portion of the year, but in places there would be water all the year, in those depressions. The land would be entirely submerged, and during a flood, and that is liable to come any time during a period of two or three months. It would not be entirely submerged for three or four months, but just during the flood period. During the months of July and August, the water would be only that that was standing in the holes,—there were three or four holes there. Some of the holes would be as large as this room, and some three or four times as big.

**Recross-examination.**

Yes, these holes are the places where I said the water was standing all the year around. They may have been barrow [118] pits where they took the dirt for the levee,—that was probably what it was.

**Testimony of Harry K. Brown, for Plaintiff  
(Recalled).**

HARRY K. BROWN, recalled for the plaintiff, testified as follows:

Mr. MACOMBER.—Q. Mr. Brown, the last time you were here, you were examined as to your capacity as a subagent for the sale of this particular land. There were certain letters, according to your state-

(Testimony of Harry K. Brown.)

ments, authorizing you to act as subagent. Did you find those letters?

A. I did not. I looked through my papers at home since then, and have been unable to find them, and I think they must be in the hands of some of the attorneys. There have been so many cases, and I think my attorneys in Sacramento have those things. There have been so many cases on this thing.

Q. You do not know where they are? You cannot state? A. I am not positive where they are.

Q. What was said in regard to these lands?

A. We took up the matter of this Scheiber ranch.

Q. Who took it up?

A. Mr. Crane, Mr. Dike, and myself, representing those people, and the Colonization Company, and I was with them, called there by them to see these people, and Miss Garwood and Dr. Ramos were present. We showed up the land and talked of its acreage—

The COURT.—Q. (Intg.) State what was said. Tell us what you said.

A. We had 600 acres there, known as the Scheiber ranch, and that it would produce—do you want the figures on this?

Q. If you know, yes.

A. The sum and substance of the whole figures were based on the facts as given to me at the time I secured the option.

Mr. MACOMBER.—Q. (Intg.) We do not want that, Mr. Brown; we [119] want to know what was said in reference to this land, as to whether or not it was your personal conclusions, or whether or

(Testimony of Harry K. Brown.)

not it was a statement of fact. What did you say to Miss Garwood?

A. It was a statement of fact, but I want it understood as far as I am concerned here, that those facts were given me by Scheiber Brothers when I visited their ranch.

Mr. MILLER.—We move to strike that out as being the conclusion of the witness.

The COURT.—The objection is overruled, and the motion denied.

Mr. MILLER.—Exception.

Mr. MACOMBER.—Q. What did you say to Miss Garwood?

A. We had this land for sale, and we considered it a very fine purchase.

Q. What did you say with reference to the character of the land?

A. That it was as fine a piece of land as could be had in California.

Q. For what purpose?

A. For dairy purposes.

Q. For raising any particular crop?

A. Alfalfa.

Q. Did you state that as a fact, or did you state it as your opinion? Was it your personal opinion, or was it as a fact that you had knowledge of?

Mr. HEWITT.—We object to the question, if the Court please, on the ground it is incompetent, irrelevant, immaterial and simply calling for the opinion of the witness.

The COURT.—I suppose you may ask the witness

(Testimony of Harry K. Brown.)

to state what he said, what was said by him and by others; as to whether it was a statement of conclusion on his part, or a statement of fact, will be for the Court to determine.

Mr. MACOMBER.—Very well.

Q. Mr. Brown, you may go ahead with your answer.

A. It is a matter of conversation of two or three hours there, all told. It would be very difficult to go into the details of all those conversations, but the substance of it [120] was as to the quality of the land, and the amount of the land, and what it would do, and particularly with the additional cows put on that land. Now, I think that should be mentioned here.

Q. We do not care anything about the cows on the land. I am simply getting at how this matter was stated to the plaintiff.

The COURT.—He has attempted to state that. As he understands, he endeavored to convey to the plaintiff the idea that if certain things were done, that the ranch would produce so much.

The WITNESS.—That is the idea, Judge.

The COURT.—Q. And be so valuable.

A. If they would care—if they would agree to put on the additional cows.

Mr. MACOMBER.—Q. We do not care anything about the cows. We are getting at this quality of land. What else was said by you or by Mr. Dike, with respect to subirrigation, or overflow, or producing quality of the land?

(Testimony of Harry K. Brown.)

A. We stated that it would produce anywhere from 6 to 8 tons of alfalfa to the acre, and there was about 300 acres then in alfalfa, and that we believed it to be the finest piece of dairy land to be had in the State.

Q. Did you say it was the finest piece of alfalfa land in the State?

Mr. MILLER.—We object to the question, if the Court please, as leading.

The COURT.—The objection is sustained.

Mr. MACOMBER.—Q. Go ahead.

A. We went on those lines, showing them the value of the land as it had been represented to us, I do not know of anything further. Those are the substances of the whole thing. The figures show, if stocked properly, on the basis of 250 cows, I am positive was the number, if it was stocked to that amount. [121]

Q. We do not care anything about the number of cows. What we are getting at is the land. Did Miss Garwood, at the time, know anything about it? Was she an experienced person with reference to the land?

Mr. MILLER.—We object to the question on the ground it is incompetent, irrelevant and immaterial, and calling for the conclusion of the witness.

The COURT.—State what the plaintiff said.

Mr. MACOMBER.—Q. What did the plaintiff state about the land? A. She had no experience.

Q. Did she state that she had any experience?

Mr. MILLER.—Objected to as being the conclusion of the witness.

(Testimony of Harry K. Brown.)

The COURT.—The objection is sustained.

Mr. MACOMBER.—Q. You told her this land would produce a certain number of crops of alfalfa?

Mr. MILLER.—Objected to as leading.

The COURT.—The objection is sustained.

Mr. MACOMBER.—Q. What did you say about the number of crops?

A. We told her it would produce five or six crops a season.

Q. How many tons to the season?      A. 6 to 8.

Q. You mean to each cutting?

A. No, sir, that is for the yearly production.

Q. Was there anything said as to any lack of uniformity in the character or quality of the land? It was represented as being uniform in quality?

Mr. MILLER.—Objected to as calling for the conclusion of the witness.

The COURT.—The objection is sustained.

Mr. MACOMBER.—Q. Was there anything said at all in reference to any of the land not being of the same producing quality? [122]

A. Only in this respect, that part of it was not in alfalfa, so in that respect part of it would not be in the same producing quality.

Q. Did you or not say that would not be able to produce as much as the other? Was anything said about the balance not being in alfalfa?

A. I think not.

Q. Was it represented as being all alfalfa land?

A. It was represented as subirrigated land.

(Testimony of Harry K. Brown.)

Cross-examination.

Yes, sir, we stated to Miss Garwood on that occasion, what in our opinion she could do if she put on certain additional stock on the property, and farmed it in a certain way. Yes, sir, we said if she put in 250 cows and handled it in a certain way, and I was put in charge, we could produce a certain amount. Only as I had seen it previous, did I know anything about river land in that section. I know something of river land in other sections of the country. I had previous to that made an arrangement on the Wright and Terry ranch, south of Sacramento. East of Sacramento about four miles. The only experience I have had with that land was in arranging to sell it. Yes, sir, I had gone over that land and knew whether it was subirrigated. I could tell by the growth. Yes, sir, I went on the Scheiber property. Twice only prior to the 23d day of September, 1911. I spent most of the first day there and went over it with one of the Scheibers. In making our representations, as they were made to Miss Garwood, we told her the land was subirrigated. Backed up by this, as given to me by these people, that it was subirrigated land, not necessary to irrigate. I could not say positively whether we told her that it was subirrigated, or that Scheiber brothers said [123] that it was subirrigated. We did not specify any part as subirrigated. We stated there were 300 acres already in alfalfa, about 300. I would not say that it was just 300 we told her that it was good alfalfa. I saw some good alfalfa there.

(Testimony of Harry K. Brown.)

Q. Did you tell her you thought the rest would produce good alfalfa or about the rest of it?

A. I do not recall as to whether or not that was taken up specifically or not. I had been on the place twice previous to that time, including that time to get the option. I did not have sufficient money to buy such a place as that. I did represent to some persons that the land, in my opinion, was worth \$150 an acre. No, sir, I was not there on the 7th day of July, 1911. No, sir, I was not there on the 5th day of July, 1911. I was there on the 4th day of July, 1911. I could not give the exact date of my first visit. It may have been several months before. I did not examine the property during the first visit, I just drove in there and was there a short time, and drove away. Yes, I was there once subsequent to the 4th day of July, 1911. As near as I know, it was Sunday, October the 8th. I think that is correct. It was on a Sunday, after the 3d of October. That was after Miss Garwood had decided to purchase the place, and put up a deposit.

**Testimony of Wm. H. Saylor, for Plaintiff.**

WM. H. SAYLOR, a witness called by the plaintiff, testified as follows:

My name is Wm. H. Saylor. I reside in San Francisco. I am in the publishing business. I publish the Pacific Dairy Review. I own land in Sutter County, close to the land owned by Miss Garwood,—the land in this case. My land lies directly south [124] of some of her's, and directly west of some of her's. My land lies partly west of the Garwood

(Testimony of Wm. H. Saylor.)

land. Taking in view of that piece that lies to the east, that would make my land on the south and west. My land runs in the middle of her land from the west. My land lies on the western south. West of some, and south of another portion. I am somewhat familiar with the terms, subirrigation. The term, subirrigation, is not a definite term, it has considerable elasticity to it. I am somewhat acquainted with the Garwood land; that is, the land which is now the Garwood land.

Q. And you are more or less familiar, are you not, with the portion and extent of that land, and the direction of that land from the river in which the subirrigation part lies? What I mean is, assuming that the subirrigation is a strip of land, the subirrigated land is a strip of land running parallel with the river, you are more or less familiar with the distance from the river to the subirrigated land?

A. As far as relates to my holding there.

Q. How far on your land, your land lying west of the Garwood land, how far does the subirrigated portion extend? A. That depends on the season.

Q. In a wet season, how far would it extend?

A. In a wet season, it possibly subirrigates almost to the end.

Q. Almost to the end of your place?

A. Yes, eastward.

Q. Now, then, that is in the northeast quarter—the northeast corner of the northwest quarter of section 24. Is that where that land lies, at the end of your piece?

(Testimony of Wm. H. Saylor.)

A. I do not remember it in point of view of the section, but I would say you are indicating by your pointing, you are pointing at the part I have in mind.

Q. Will you step down here to the map? This is the Garwood land (indicating)?

A. Yes, sir. [125]

Q. Do you recognize this as your land?

A. Yes, sir.

Q. Is that a correct detail of the respective pieces, so far as you know? A. So far as I know, yes.

Q. I understand you to say, in wet season that sub-irrigation on your tract of land would extend almost—

A. (Intg.) I mean in wet season such as we have now, and can grow crops.

Q. In the west portion?

A. Yes, sir, and as produced now.

Q. But not quite to the end at any time; is that correct?

A. Almost in any season there will be some alfalfa; some seasons you can grow corn and some seasons not. This is a season when the corn is growing all up there, and the alfalfa. My land is to the west of the lower portion of the Garwood ranch. My crops were a failure then. The alfalfa will continue to grow through a season of that kind, but it will be short. Alfalfa is deeper rooted than potatoes and corn. I would not say how many tons of alfalfa to the acre, the land would produce, because I have only been there when we had one dry year. We only harvested the alfalfa twice, we grazed after that. I

(Testimony of Wm. H. Saylor.)

have not been sufficiently over the land of the Garwood place to form an idea as to the extent of the subirrigation. I have seen water on that land to the east of my place. I was only up there a day at a time, and do not know how long it would stay there. I have not seen water over all of it. I have seen water over certain areas. I could not define just now from recollection. Certain reclamation work has been done in this neighborhood to keep the water from backing over the land, to save that land, and the land similarly situated from the overflow. That work has been extensive and expensive.

Cross-examination.

I have never resided in Sutter County. I was never on my own ranch to exceed ten hours at one time. [126]

**Testimony of T. J. Mulvany, for Plaintiff (Recalled).**

T. J. MULVANY, recalled for the plaintiff, testified as follows:

I have lived in that neighborhood since '77. I am familiar with that land in the district 1001 in reference to overflow, and in reference to the character, quality and condition of the land. I understand what is meant by subirrigated land. I have an understanding of what is meant by river-bottom land. I am familiar with this reclamation district 1001 with respect to the overflow of the rear end of those ranches. I have been until recently one of the reclamation trustees of that district. During the year 1911 and prior thereto the rear end of this land

(Testimony of T. J. Mulvany.)

was subject to overflow. The rear portion of the Garwood ranch is not subirrigated. The subirrigation does not extend the same distance from the river at all points along the river; it varies. It varies from one-fourth to one-half a mile. On the Garwood place the subirrigation extends about one-third of the ranch, possibly one-half. The soil at the far end of the ranch is a heavy soil; it borders on adobe, clay. It is not such a character of soil as to be readily permeated. The rear land is not what is considered alfalfa land. It is spoken of as grain land. During the year 1911, and prior thereto, if alfalfa were planted on that land the overflow might destroy it at any time, and if there was no overflow, it would require to be supplied with water. If it were irrigated, it would produce some alfalfa. I do not think it would be a profitable enterprise to try to raise alfalfa on that rear land. I cannot say what the yield would be. It would be rather light. I have seen a great deal of land planted with alfalfa under artificial irrigation. It is my understanding that there is a difference [127] in value between alfalfa produced on subirrigated land, and that produced by artificial irrigation. The ordinary irrigated alfalfa is worth more; it is of a different quality; it is not so strong, those dealing in it tell me. I do not know myself, I never raised that kind. Most any land will produce alfalfa with water, but not in paying quantities. The cost of water would have to be considered if alfalfa were raised on the rear end of the place. The yield would be small in com-

(Testimony of T. J. Mulvany.)

parison to the other land. I estimate that the land on that place, not subirrigated, consists of the 160 acres; that is, the northeast quarter of section 24, and probably 80 acres north of the quarter section. That much of the land is not subirrigated land. I have lived there since '77, or thereabouts, and have been familiar with the various sales of real estate during that time. In a general way, I am familiar with the value of land in that district. I have bought land myself, and heard of other deals. I have been a land dealer for many years. I would know land near my own up there. I was a trustee of the district. In a general way, I have knowledge of the market value of the land in that river bottom there. That rear portion of the Garwood place, of which I speak, in 1911 was worth about \$60 an acre. I would place that quarter section, and probably one-third of the ranch at the east side, at \$60 an acre. The land above the quarter section is worth a little more. There is no subirrigation there, but the quality of land is better. It has a little higher contour. I figure that it would be worth about \$75 an acre in 1911. As to any land lying outside of the old levee, that land in 1911 would be worth about \$10 an acre for the timber that is on it. As to any land existing outside of the levee, or across the river, there was land on that side years ago, which is not there now. Probably about 70 acres, [128] and that is in the bottom of the river. That is now in the bottom of the river. That is, it was in 1911. The river channel ran right over that, except a small portion, may-

(Testimony of T. J. Mulvany.)

be an acre or so, and a little piece west of the old levee, of three or four acres, probably five acres. There was four or five acres of good land, that triangular piece. It is there, it was there in 1911, but the portion west of that, about 70 acres, is practically all gone. That has been all taken by the river. It was taken about 25 years ago. There is no land there. It is water—the river, the main current, the greater portion of it. Yes, sir, I have raised alfalfa, and have had experience in growing alfalfa. As to how much water it takes to be fatal to alfalfa, and as to how long it takes the water standing on alfalfa, to injure the alfalfa, it depends upon the temperature and growth of the alfalfa. New alfalfa in cold water will stand probably a week. In warm water it is easily destroyed. The temperature is material. Warm water will kill alfalfa in two or three days. Some years it gets warm up there in May and June. Ordinarily it runs from 80 to 90 degrees, sometimes 100 and 110 in May and June. I have seen the Garwood place overflowed in June a great many years ago. Over 20 years ago there was a crop of barley on the field, and it was destroyed in June by the backwater backing up. Yes, sir, it was destroyed in June by water backing up. I do not know how long the water stayed, but it was enough to destroy the crop. Those individual levees in that district were built there to protect the owners' lands from the overflow, so that alfalfa could be raised, whatever crops there were. The Garwood place in 1911 was subject to overflow from Bear River. It was

(Testimony of T. J. Mulvany.)

also subject to overflow at times from Coon Creek, and was subject to overflow from the tule water or basin. That water [129] came from the Feather River or from the Sacramento River. In high water it came in from the back. The artificial channel, of which you speak, was commenced and completed in 1913. Previous to 1913 the main body of the river went around the bend, and when the river was high it went across the bend through the timber, all over it. Since 1891, or 1890, there had been for a number of years an old levee to the east of the cut-off. When the cut-off was made, they put in additional levees and strengthened the old ones. In 1911 during high water, the water spread all over the land outside of the old levee. In high water the boat went straight down instead of around the bend. In low water the boat was compelled to go around. I do not suppose that in low-water times there was any water where the artificial channel is now. I have not been there those times; I have not been on the ground. During all the time the water was high, the water was there in that channel. During the past 25 years the river has worked south and covered about 70 acres, or more, of land off this particular property. Referring now to the back land that would overflow from the back waters whenever there was high water in the tules, in a dry season at times it would pass the winter without overflowing, nearly every second or third year. I have seen it every time when it was not overflowed.

(Testimony of T. J. Mulvany.)

Cross-examination.

During flood water the entire section west of the old levee was overflowed from the old levee, clear across the old channel of the Feather River. As near as I know, from the river clear on across the old Sutter Tule Basin, except the Southern Pacific Railroad grade. A man by the name of Ewing had a crop of barley destroyed on this Scheiber ranch in the month of June. Ewing lived there over 20 years ago. I think the Scheibers have been [130] living there about 20 years, and it was prior to that, Ewing lived there. Yes, I have been over the northeast quarter of section 24. I passed by there probably every year. I have looked over it. Yes, sir, in years past I have been on the land outside of the road. I do not recall what time I was there on the field. I think I have been on the quarter section of the land inside the fence in the last ten years. I would not say positively at this time. I have been on both sides of it along the road. I think I have been on the land in the last ten years. (At this point the map was introduced in evidence, marked "Plaintiff's Exhibit No. 2.") Yes, I think I have been right on the land. I think I have driven through there in the last ten years. Yes, I have driven through there to the house, and I have been out the other way. I have been through there three or four times in the last ten years. For its size, the Scheiber ranch is rated as one of the best alfalfa ranches in the community, probably more alfalfa land in one body. The Scheiber ranch is the largest.

(Testimony of T. J. Mulvany.)

There are other ranches that are larger in proportion of alfalfa. I state the price at \$60 an acre in 1911. There has been no sale made up there for some time.

Q. Land has a market value, I presume, even if no sale has been made?

A. I do not know how to determine that. I understood Saylor paid \$100 an acre for his ranch. As near as I know, Borgman paid \$60 an acre for his place. It is difficult to get the exact cost, because the deeds do not show the amount.

Q. The land outside the old levee, between the old levee and the old channel, the old river channel never was rated as having any particular value?

A. Which piece?

Q. It was all timber land. I refer to the land between the old levee and the old river channel.

A. I do not know of any old [131] river channel connected with that piece.

Q. Do you know where the river ran before the old artificial cut was made?

A. There are two pieces there distinct in my mind, the larger one between the old levee and the new levee about 70 odd acres of land, and then this other—

Q. —We are speaking now of the land as it existed in 1911. There was only one levee there at that time, was there not? A. Yes, sir, that is all.

Q. The land between the old levee and the old river channel had no particular value at that time, did it?

A. There is no old river channel there at that point.

(Testimony of T. J. Mulvany.)

Q. Where did the river run?

A. It runs now as it did years ago, in the same place.

Q. The same place?      A. Yes, sir.

Q. Didn't you just state a few moments ago it was one body of water from the old levee to the Sutter Basin except where the Southern Pacific grade is?

A. Not the one that washed away.

Q. Are you familiar with *the where* the river ran 20 years ago there?      A. Yes, sir.

Q. I will put the question this way to you: the land lying between the old levee and the old river channel as it existed 20 years ago on the Scheiber ranch had no particular value at any time since then?

A. It was washed away before that, consequently there is no value at all of that portion.

Q. Was it all washed away?

A. The river was running over it.

Mr. HEWITT.—I ask that the answer go out, and that the witness answer the question.

Q. Read the question, Mr. Reporter.

The COURT.—Q. Try to answer the question, if you can. Read the [132] question, Mr. Reporter.

(The reporter reads the question.)

Mr. HEWITT.—Q. I want to know if all that land lying west of the old levee was washed away?

A. Not all; two or three acres, I think.

Q. This mark here on the map represents the old levee?      A. Yes, sir.

Q. Was any of this land in here washed away?

(Testimony of T. J. Mulvany.)

A. No, sir.

Q. There is some 60 or 70 acres there? A. Yes, sir; there was another piece I was speaking of that was washed away.

Q. The piece I was speaking of is between the old levee and where the old river channel ran 20 years ago?

A. The river runs right now where it did then on that piece; there is no change there. There is a change on the other piece.

Q. Then there was some land on the other side of the river that belonged to the Scheiber ranch?

A. I do not know what is on the other side of the river.

Q. Can you recall where lot 4 of the southeast quarter section of 11 is? A. No, sir.

Q. Or lot 5 of the southeast quarter section of 11?

A. I am not familiar with the terms.

Q. Do you know where section 14 is located there with reference to the Scheiber ranch? A. Section 14?

Q. Yes. A. I never studied the ranch, I do not know the description.

Q. You do not know if any of the land represented by those lots was washed away, or not, do you?

A. I cannot identify the lots with the land.

Yes, sir, I have seen the northeast quarter of section 24 of the Scheiber ranch covered with water in June. That was [133] the only time, in June. There was extraordinary weather in June of that year. That was about the only time I saw it—in

(Testimony of T. J. Mulvany.)

June. I was one of the trustees of reclamation district 1001. I held office four years. The reclamation district was formed in 1911. During a session of the Legislature, the first month in 1911. Yes, sir, this artificial channel was constructed by the reclamation district. It was constructed with a dredger. The channel was made 150 feet wide, and since then it has been enlarged by the flow of the river. Yes, sir. I have been over where the old channel was, the old river channel—in '91. That land between the artificial channel and the old levee has always been overflowed with wild timber for fire purposes; I never saw it cultivated. It was a wood lot. I was on the west side of the cut-off about 25 years ago when the owner was putting up a house. A few years later, I think in '91, the levee broke near it. The other portion went away, and the land went with it, and consequently I have not been there, unless on a boat. I couldn't be on that part of the ranch after it was washed away, unless I traveled up and down the river. The river channel at that point was consequently working south. I should judge it was 700 or 800 feet wide in width. It kept on working down and making a new channel. After it worked south it maintained the same width. I never had any trouble with the defendants. I never had any trouble with Morris Scheiber in reference to any creamery business. I do not know whether he worked against me at the election as a reclamation trustee at the last election; probably he did. I do not know what he did. I know he did not sup-

(Testimony of T. J. Mulvany.)

port me. I had some trouble, you were the attorney with Bennie Scheiber, not these three men. [134]

Redirect Examination.

Yes, sir, I said that the Saylor ranch was sold at \$100 an acre. I believe that there are 100 acres to the place. The Saylor ranch lies between the river and that portion of the Garwood place, which I stated was worth from \$60 to \$75 an acre. The far easterly corner of the Saylor ranch is separated by the public highway from the westerly boundary of the land on the Garwood place, which I stated was not subirrigated. The easterly corner of the Saylor ranch, the portion of the Saylor ranch which was not subirrigated, lies clear to the west of that portion of the Scheiber ranch, which I stated was not alfalfa land. It is much closer to the river. The Borgman place lies directly west of the quarter section comprising the southeasterly end of the Garwood land. The Borgman place lies west of this Garwood land. The Borgman place is almost coincident with the northwest quarter—of the northwest quarter of section 24, township 12, north range 3 east. In reference to subirrigation, the Borgman place is for that reason considerably better situated in reference to subirrigation, than the lower portion of the Garwood land.

Recross-examination.

The public highway is the only thing which separates the Saylor place from the northeast quarter of section 24. The Saylor ranch is on the westerly side

(Testimony of T. J. Mulvany.)

of the public road. Section 24 is on the easterly side. The road is 40 or 60 feet wide.

### Redirect Examination.

The western portion of the Saylor ranch is very fine alfalfa land. A few acres at the east end of it is outside the good alfalfa belt, and it produces a couple of crops to the year, while the other all produces 5 or 6. Probably 100 or 90 acres of the [135] Saylor place is good alfalfa land. The best of it is on the west side, and as you go east there is a change. I would consider all of the Saylor ranch good alfalfa land with the exception of that little corner, and a portion of the ranch that was covered with sand several years ago. The best portion of the Saylor ranch is very fine alfalfa land. It is as good as any along the river, it will raise 5 or 6 crops without irrigation. The Borgman place is irrigated by pumping water from wells, they pump a great deal of water. The Borgman place is artificially irrigated.

### Recross-examination.

Mr. HEWITT.—Q. Is the Borgman place entirely irrigated by water pumped from wells? A. I think that the water is conducted over most of it. His place is nicely improved. The water is conducted in cement pipes to a large portion, and I think it covers the whole of it except 40 acres.

Q. I do not want to know what you think, I want to know whether the place is irrigated by artificial irrigation.

A. Not the last time I was there; he was gradually undertaking the irrigation of it.

**Testimony of Clinton L. White, for Defendant.**

CLINTON L. WHITE, called for the defendant, testified as follows:

I am an attorney at law and have been for nearly 40 years, practicing in this state during that time. I have lived and had my office in Sacramento during that time. I cannot remember the exact date that I first became acquainted with the plaintiff, Isabelle Garwood. I can fix the date pretty accurately by the date of the contract that was signed between the Scheiber Brothers and Miss Garwood. (It admitted by counsel to be September 27th, 1911.) [136] The date of the contract was September 27th, 1911. I became acquainted a day or two before that contract was signed. Mr. U. L. Dike first came to me and said that his firm had been instrumental in making the sale of some property, and that the contract was going to be rather intricate, and they wanted me to prepare it. They thought it was beyond their ability, and he gave me the names and gave me memoranda concerning it. (The contract of September 27th, 1911, was identified by the witness and marked defendants' Exhibit "A" for identification.) I have seen this paper dated Sacramento, California, September 25th, 1911, before. I am not sure that I saw it until just a few days ago. This may have been exhibited to me by Mr. Dike about that time. I cannot recall of having seen this paper until three or four or five days ago—either Saturday or Monday of this week. It was handed to me by Mr. Miller in my office in Sacramento.

(Testimony of Clinton L. White.)

(Paper marked, Defendants' Exhibit "B" for identification.) Mr. Dike first came to me, and he had memoranda of his own. I did not pay very much attention to it, and I made my own memoranda from the conversation. I think I saw all of the parties to the contract before I finished the contract, ready for signature. I think the contract was read over to them all. They were all there present in my office at that time. They all signed it in the office at the same time. In the drawing of that contract I did not represent anybody in particular; I represented all parties; it was a mutual matter. They had come in and directed me to draw a contract, and I did so. I do not represent one any more than another. I did not understand there was any controversy between them. They wanted a fair contract, and I tried to draw such a one. Yes, sir, I endeavored to favor one of those parties in a way. I intervened in several matters for Miss Garwood. About a [137] day before the final consummation of the matter, the execution of the deeds and mortgages, one of the Scheibers came to me and explained that the land was in the new reclamation district, and that the district was going to use a part of their levee, and they were going to issue scrip, as he called it, a reclamation warrant, where they were going to reconstruct the levee, making it nearer the river, and he wanted to know of me if I did not think that they were entitled to the scrip, and I told them that I thought Miss Garwood was entitled to the scrip. She was not there at the time. That was a day or two just

(Testimony of Clinton L. White.)

before the deeds and mortgages were executed, and on the day of the final transaction when the deeds and mortgages were executed, I called Miss Garwood's attention to the fact that the levee was going to be changed in that reclamation district, and that she would be entitled to some scrip; that she could use it in paying reclamation assessments. They were going to build the levee nearer to the river, and that would result in her having more land inside of the levee, more land for her. On the day the deeds and mortgages were executed, and while we were talking about the matter of scrip she would be entitled to receive, I made this memorandum and threw it on my desk. I made it complete then except for the figures. I am not sure that the figures showing the amount of script were put in then; it may be that I 'phoned to some office, or the office of the Natomas Consolidated to obtain the amount, but I am not sure. I knew that it would be somewhere about \$5,000, but whether I got the information over the 'phone at that time, or a little later, in regard to the amount, and put it in, I cannot say. It is slightly heavier pencil marked than the other. (At this point the memorandum marked defendants' Exhibit "C" admitted in evidence.) After the agreement of September 27th, 1911, and before the execution of the deed and [138] mortgages I rendered an opinion of title on the property. That document, which you show me, marked "Opinion of Title" was drawn by me for her, that is the opinion which I made for her. I think I had two or

(Testimony of Clinton L. White.)

three of them written. I think I signed two. They were made on a typewriter, and were just the same. That is the one I signed at the time. I do not know where you got it. My recollection is I sent one of the opinions to her by mail. She received it before the deal was consummated. On the 23d of October, 1911, I wrote her a letter in which I sent her the Opinion of Title. I cannot recall any circumstances about it, but I have no reason to doubt that she received it. She did not pay me for the opinion, no sir. (At this point, Opinion introduced in evidence marked Defendants' Exhibit "D.") It was mailed to the plaintiff in one of our large envelopes with a return in 5 days if not delivered put on it. My recollection is she discussed the matter and asked me questions about it. I mailed it to her about the 23d day of October, 1911. The deal was consummated on November 1st.

"Q. Do you recall whether or not Miss Garwood or anyone else asked you to explain the words '600 acres more or less' contained in the contract of September 27th, 1911, or in the receipt which Mr. Dike gave to Miss Garwood and which I have had marked Defendants' Exhibit "B" for identification?

A. I cannot say anything about the receipt that Mr. Dike gave. I have some faint impression that Miss Garwood may have asked me about the expression more or less, and that I explained to her, as I would explain to anybody about that, the expression of the acreage was an approximate statement of the amount of it; that [139] there might be

(Testimony of Clinton L. White.)

more or there might be less than 600 acres. Q. Did you at that time or at any other time say to Miss Garwood that the expression 'more or less' in connection with the number of acres was a mere law term? A. I cannot recall any such thing. In 40 years of law practice I never used that expression in consulting with a client. I either give an explanation to them or I do not. I do not use that expression. I never used the expression to anyone saying it was a law term. Q. Did Miss Garwood say to you at any time that it was her understanding that she was to get 600 acres of the finest alfalfa land in the State of California? A. I cannot recall that she used any expression of that kind. She spoke enthusiastically to me about the place. I have a faint recollection she asked me my opinion of the place and I told her I did not know—"

I told her that it was in a good neighborhood and that alfalfa land was a good thing in California. She did not explain to me anything about she was to get 600 acres of the finest alfalfa land in the State recollection that there was served on me a paper signed by Miss Garwood, consisting of a notice of rescission, or a deed, or offer of a deed of reconveyance. The Scheiber boys brought in several of them. My recollection is that one was served on me from Mr. Devlin's office, and then a few days later a lot of duplicates were brought in by the Scheibers. The notice to Joseph Scheiber and Frances Scheiber, his wife, Morris Scheiber and Emma Scheiber, his wife, and John Scheiber and Anna Scheiber, his wife, dated the —— day of March, 1912, was marked

(Testimony of Clinton L. White.)

Defendants' Exhibit "E" for identification, and was introduced in evidence by plaintiff and marked 'Plaintiff's Exhibit 4.' [140]

Cross-examination.

This transaction took place in 1911. I hardly think my memory is hazy on the details of the transaction. I have not any accurate memory of the words a person uses in conversation with me, but I have a pretty accurate memory of what occurred in regard to this matter, because it was emphasized sometime about January or February, 1912, when Miss Garwood came to my office and said she had been cheated by the Scheibers and wanted me to commence suit against them. I knew of nothing in the transaction in any way but what was perfectly fair. At the time the contract was signed the Scheibers were present. That is my recollection. The two of them were there, I am sure that two of them were there. I will not say positively whether or not the third one was there. They all subscribed their signatures to this contract. I have an impression we sent the contract out to be signed by one of them. I think those that were there took the contract back to be signed. I do not think that Dr. Ramos was there. Miss Garwood was there; she signed the contract in my office. Mr. Dike was here. Those persons were in my office, and there may have been others. I read the contract to them. I feel quite sure Miss Garwood did not interrupt me when I came to the words "more or less." I will not say with absolute certainty, but to the best

(Testimony of Clinton L. White.)

of my recollection she did not make any interruption at all. I would not say that she said something about the words "more or less." I did not say so in my direct examination. Oh, yes, I did say something about the words "more or less." I said in my direct examination that I cannot recollect with certainty whether she asked me about the words "more or less" or not; that if she asked me for an explanation of it I told her as I would tell anybody else that the term "more or less" would mean some approximate [141] statement, there might be more and there might be less than 600 acres. I do not know how much more or less. I did not tell Miss Garwood at that time that the words "more or less" were of no particular significance; that when it said 600 acres it meant 600 acres. If I were to be asked about my understanding of the term "more or less," I would explain to them that the statement of the acreage would give way to the boundaries of the land and more accurate description. There were two or three descriptions of the property in that document. It has always been my understanding of the law for a great many years past that the accurate description of metes and bounds takes the preference over acreage. Where the words "600 acres more or less" are used, without any metes or bounds given as to what it would mean, that would depend. I would not say how much of a fraction the words "more or less" provided for. I would not think 25 per cent; I do not think that 25 per cent would be with-

(Testimony of Clinton L. White.)

in the meaning of the words "more or less." My practice and observation has led me to believe that theoretically surveying is practical, and in practice it is not. I think the expression "more or less" would cover an inaccuracy of considerably more than 5 acres. I think that such a small percentage as that would not be a matter of complaint. As to what I said to Miss Garwood in reference to the meaning of the words "more or less," I could not give you the exact words that I said, to anybody in a conversation that occurred 4 years ago. I do not recall that any of the Scheiber Brothers spoke or said anything about the number of acres. I do not think that Miss Garwood interrupted me. The talk about the script came about the time the mortgages were executed. I think that was the first of November. I do not think she knew that she was going to get a rebate. I think I disclosed it to her for [142] the first time. She asked me what I meant by scrip. I do not think I was the attorney for the California Colonization Company. I do not know of being the attorney for Mr. Dike. Mr. Dike and different real estate men used to come into the office to have contracts drawn up, and very frequently to get Opinions of Title when they made a sale. I was acquainted with Mr. Dike and Mr. Crane. The incorporation papers of the California Colonization Company may have been prepared in our office, but I am quite sure that personally I had nothing to do with it. I do not know that the corporation papers were prepared in my office.

(Testimony of Clinton L. White.)

I say that it is possible they may have been. The California Colonization Company may have existed six months or a year before this contract was made. I do not know how long it existed afterwards. There were a lot of papers prepared one way and another—bills were made up for them, and items charged on our books by somebody in the outer office who looked over the record, and with the exception of the \$25 marked on the opinion as being the charge for it, the bookkeeper or somebody in the outer office must have made an estimate of what was fair. I do not think I made a statement at all about it. For instance, the charge for the preparation of the deed was made against the Scheiber Brothers. The charge for the preparation of the mortgages was made against Miss Garwood. My recollection is that the charge for the preliminary contract was made against the Scheibers. I do not know why, I did not order it done. I do not think that anything was ever paid by the California Colonization Company. I do not think we charged anything against them. We did not consider that they had employed us in the matter. I do not think Miss Garwood avoided making a payment. My recollection is she asked me before the transaction was completed something about making [143] a payment, and the work had not all been finished yet, and there had been no bill made out, and I gave her to understand that the time was not ripe for the presentation of a bill yet, as there were other papers still to be prepared. My impression

(Testimony of Clinton L. White.)

is it was before the deed and mortgages were made that she made the statement about what had been done up to that time.

**Testimony of Isabelle Garwood, for Plaintiff.**

ISABELLE GARWOOD, plaintiff, called upon her own behalf, testified as follows:

I am Isabelle Garwood, plaintiff in this action. My home is in New York City. I am a resident of the State of New York. I first arrived in Sacramento in September, 1911; just as the State Fair was closing. I first went to the office of the California Colonization Company to talk about buying some acreage. Upon the occasion of my first visit to the office of that Company, I told them I had \$6,000, and that I wanted to buy some acreage. They wanted to show me some land, and I told them that I was simply making inquiry and would not look at anything until there was a gentleman present, in whom I had the greatest confidence, who would advise me. I told them I would bring the gentleman to the office. He came, and I took him to the office in the morning of the 20th of September, 1911; that was on a Wednesday. This man was Dr. Ramos, F. I. Ramos. I introduced him to them as Dr. Ramos, and said now I would go out and look at the property.

I told the officials of the California Colonization Company that I was engaged to be married to Dr. Ramos. I told this to Mr. Crane and Mr. Dike. On that day, on the 20th of September, 1911, we went out to look at land. We went to some island down

(Testimony of Isabelle Garwood.)

the river—Mr. Crane, the chauffeur, the Doctor and myself—four of us. On the way back they stopped and left me in the car on the levee, and the three men went over to a saloon and stayed there from 20 minutes to [144] a half hour, a good half hour I think it was. All three of them went and left me there. We then proceeded on our way to Sacramento.

Q. In the meantime when you were driving—what was said after that on the way back?

A. The doctor said, I think, “Alfalfa is considered a great thing.”

Mr. MILLER.—We object to any conversations or representations made by any of the parties or any of the alleged agents or by anyone excepting the defendants on the ground that there is not shown to be any authority whatsoever in anyone to make any representations at all. The contract here was a contract whereby a middle man was employed to find a purchaser, and the middle man had no authority except to bring the parties together, no authority to make any representation or anything of that kind. I submit the objection upon the ground it is hearsay, immaterial, irrelevant and incompetent.

The COURT.—I will hear the testimony. The objection is overruled.

Mr. MILLER.—They had no right to delegate that authority to any agent or subagent.

The COURT.—I will pass upon that question later.

Mr. Bucholz said, “If you are buying alfalfa land, you ought to buy a dairy; I can sell you 600

(Testimony of Isabelle Garwood.)

acres of the finest land for alfalfa in this State at \$125 an acre." Then Mr. Crane, who was sitting beside me, spoke up and said, "That is Dike's pet scheme, he wanted to form a corporation, and he had the superintendent already engaged to sell stock." This occurred when we were riding back on the levee. We rode 30 miles on the levee; I had never seen a levee in my life and I commented on it. They told me they were going to St. Andrews Island, or something like that. They said we rode 30 miles on the levee. The river was right along side of it on one side, and there were farms on the other side. That was the [145] first time I had ever seen a levee in my life. I did not know anything about the country. In the automobile Mr. Crane said, "If you will step into the office on the way back, we will show you the papers, and tell you about this land," and when we returned, we went there. He said, "Dike has gone to get hold of Brown on the telephone," and they telephoned to Brown, and Brown replied that he would send the papers, but that he could not come until Saturday. The next morning Mr. Dike took us to this land—Mr. Dike, the chauffeur and the Doctor and myself made up the party.

Q. As you were leaving do you recall anything that was said by any of the gentlemen?

A. Yes. I think I was in the carriage, in the auto, and Crane came out and said "Miss Garwood, the doctor is the most charming person out here I have ever met, I wish he would join us in business; I wish he was going to be a partner and live here, but even

(Testimony of Isabelle Garwood.)

if he didn't live here that we would give him commissions, his mere looks would sell property," that he was the most charming person he had ever seen in his life.

The next day we visited the ranch. We went by automobile from Sacramento to the land. We went in through Triplin. We did not go to Nicolaus. We did not stop until we reached the ranch-house. I had a sprained ankle at the time, and could not leave the automobile at all, and as we passed up the levee in the automobile Mr. Dike asked me if I wanted to go up on the levee and look over the country, and I told him "Oh, no; I want to see the farm, I could not walk on a hill." That was all that was said. Then we went on down to the ranch-house. Then I got out of the car, and I stopped at the ranch-house. They took the auto back to the stables, and the Doctor and two of the Scheiber men went down there alongside of the stables to talk. I was on the porch, and they talked about going to Germany, and wanted to know if I was German. I did not go around the ranch any place; I sat on the porch.

After lunch Dike said we would go and see the animals. I said, [146] "You will have to bring the car, I cannot go." I stopped there on the porch, and the Doctor said, "Don't you move, I will see them, and that is all that is necessary, you do not have to look at them." I sat there and talked with the wives, and with one or two men, as many as there were there. The Doctor went around with Dike and the chauffeur. The wives and one or two of the men

(Testimony of Isabelle Garwood.)

remained with me at the ranch-house. We arrived at the ranch-house a little before lunch. We had lunch there. I think we left Sacramento a little before 10:00 o'clock in the morning. I think we left for home at about 2:00 o'clock. I had some conversation with one of the three brothers there at the house. This conversation took place when the wives were there and one or two of the men, I am not sure. Dr. Ramos and Mr. Dike were looking at the animals, and the fields. [147]

Q. Now, what conversation did you have with any one of the Scheiber men, the Scheiber Brothers?

A. Well, I had no idea of buying the ranch, I was trying to entertain them, and I said, "Where is this land?" and they pointed at the levee and they said "along that green line"—

Q. Do you remember which one of the brothers that was? A. I think it was Morris, the little one. Right along that green line to the white house. And I said, "What green line" and they made it more explicit and they said "Down that fence to those trees and across those trees, from the lower fence up to that grove." That is the only description I ever heard of the property in my life.

Q. What did he indicate when he said "along that green line"?

A. The levee. Q. He pointed to the levee? A. He pointed to the levee, to the white house, which was a stable.

Q. Is that the only description which he gave you?

A. That is the only description I ever had of the land.

(Testimony of Isabelle Garwood.)

Q. Did you ask him anything about that land in respect to its quality or points of desirability? A. I said, "Tell me all about this land" and they spoke very favorably of it in every way. Then I said, "Well, you have told me all the good things about the land, is there anything bad about it" and they said, "Nothing at all, it is all alike, you see, clear level land."

Q. Did you know what river lay behind that levee? A. I thought it was the Sacramento; I thought that was the same levee I had been on before. Q. What river do you know it to be now?

A. The Feather River. I had never heard of the Feather River. I was staying in Sacramento.

Q. That was before there was any new levee built there? A. The new levee was not built.

Q. Now, then, how long did you stay there at the ranch-house altogether? A. I think we must have been there a couple of [148] hours; maybe not as long as that; we were quite awhile at the lunch table; maybe not over an hour and a half.

Q. Then the doctor and Mr. Dyke and the rest of them finally returned? A. Then we drove back to the station.

Q. Which way did you go out? A. It seems to me we went back the same way. Q. Are you able to state whether you went back on the levee by way of Nicolaus, or near to the town of Nicolaus?

A. I could not tell you which way we went. I was talking and not paying any attention, I was not interested in the land at the time at all. Q. Now, then,

(Testimony of Isabelle Garwood.)

you returned to Sacramento; is that the idea?

A. Yes, then I returned to Sacramento.

Q. On the trip up from Sacramento did Mr. Dyke make any reference to this land or say anything to you about this ranch in respect to overflow waters?

A. Mr. Dyke showed me some land overflowed and said that that did not.

Mr. HEWITT.—We wish this to go in subject to our objection.

Mr. MILLER.—I understand all these conversations, much of which we claim is immaterial and irrelevant, are subject to our objection.

The COURT.—Yes.

Mr. MACOMBER.—On the occasion of the trip up to the ranch from Sacramento on this particular day what did Mr. Dyke say with reference to the overflow? A. He said—I had never heard of overflow land in my life, I had never been in Sacramento before; when I went there the doctor was not there and I went to San Francisco and came back again when he came, don't you know, and I knew nothing about overflow land, and I said that they told me they would sell me a dairy, and he said, "Don't you buy any overflow land"; then going through the country up to the ranch he pointed out a gulley and said, "This land over here overflows"; [149] then we went on to the other and he said "That don't overflow" and he told me if I bought it to have—

Q. —We do not care anything about what he told you in that respect because that is not part of the case. A. He said, "The Natomas land overflows and

(Testimony of Isabelle Garwood.)

the Natomas people would not sell their land under \$250 an acre, they have got to stop that overflow too"; and he said, "You will get your land for \$125 an acre and it is already stopped; there is nothing there, it is ready for use." He said, "The Natomas Company even after they stopped their overflow have to turn up the land for a year before it could be used."

Q. We do not care about that. What did he say with respect to this particular land that you bought?

A. That this was the finest alfalfa land in the State, that I could sell it for three times what I paid for it if I held it until the Fair in small farms, from 5 to 20 acres; he said he would cut it up.

Q. What did he say about it with respect to the overflow? A. He said there was no overflow; he said that, "Your levee is built and you will get \$5,000 back and the people whose levee is not built they have got to spend money but you have got nothing to pay, you will get \$5,000 and the Scheibers told me the same thing. Q. Did any of the Scheibers make the same remark? A. They said, "You will have nothing to pay," yes.

Mr. HEWITT.—We object to this conversation, there is no time or place fixed. A. This was at the house that they told me that, when I was sitting on the porch.

Mr. MACOMBER.—Q. Upon the occasion of that first visit? A. Upon the first visit. They said, "The levee is built and you will have nothing to pay." Q. Which one of the Scheibers told you that?

(Testimony of Isabelle Garwood.)

A. Morris, I think Q. The same one? A. Yes, I think he was the one that stayed and talked with me.

[150] Q. Then you returned? A. To Sacramento,

Yes. Q. When you returned to Sacramento what did you do? A. On the way back Dyke showed me a

check and told me what a magnificent business the dairy business was. Q. We do not care anything

about that. A. Showing how much they made every

month. Q. Now, wait a moment. Did you see any

of the officials of the California Colonization Company the following day? A. The next day they took

us to Auburn? Q. What day of the week was that

or what day of the month? A. Wednesday we went

to the ranch and Thursday we went to Auburn.

Q. Aren't you mistaken on your dates? A. Wednesday

we went down the river, Thursday we went to

the ranch and Friday to Auburn. I have forgotten

about going down the river. That was the first day.

Friday morning we went to Auburn; we went to the

ranch. They took me to Auburn to see whether I

would rather have that than the other. Q. That is,

Auburn or the ranch? A. Or the ranch. Q. Then

on Saturday, the next day following? A. (Intg.)

Saturday was the day that Brown came and we met

him at Davis or Dixon. Q. You say that you met

Mr. Brown? A. On Saturday. Q. Who composed

the party upon that occasion? A. Dyke and the

chauffeur and the doctor and myself. Q. Mr. Dyke

and the chauffeur and the doctor and yourself?

A. Yes. I did not get out of the carriage. They

said, "Don't you get out, you don't need to see it";

(Testimony of Isabelle Garwood.)

the doctor said, "We will look at it, you needn't get out" because I couldn't walk around on my ankle.

Q. Doctor Ramos and the chauffeur and Mr. Dyke you say went and looked at the dairy? A. They went and looked at everything.

Q. What character of dairy was that? A. A certified dairy.

Q. Did you meet Mr. Brown there? A. I met Mr. Brown there.

Q. What time of the day was it you met Mr. Brown?

A. I don't know, but it was, well, it was along in the afternoon I think; I don't think we started very early in the morning.

Q. And then you returned to Sacramento? A. Then we returned to [151] Sacra-

mento. Q. How about Mr. Brown, what did he do?

A. On the way back Mr. Brown talked about alfalfa that grew on irrigated ground, that it was not as good as alfalfa growing on subirrigated land, that alfalfa that grew on subirrigated land when you burned it left a residue and the other did not, it was more substantial.

Q. What did they say about the land in Sutter County, the Scheiber Brothers' land, with respect to subirrigation? A. They said it was thoroughly subirrigated.

Q. Did they tell you any of it was not subirrigated? A. No, they said it was all subirrigated, and 600 acres of the finest alfalfa

land in the State. Q. Who told you that? A. They all told me.

Mr. MILLER.—These are all material matters; we object to leading questions on vital and material points in the case.

The COURT.—Yes, counsel must not lead the witness.

(Testimony of Isabelle Garwood.)

Mr. MACOMBER.—Tell us exactly what was said about the land? A. They said it was all subirrigated land, that it was the finest alfalfa land in the State; that it would raise two crops a year; that it would raise from 8 to 10 tons of alfalfa a year, 7 to 8 cuttings, 6 to 8 cuttings, and under the right-hand levee there was one three-cornered field that would cut 8 times. This all made an impression on me because I never heard of alfalfa in my life before. Q. Did you meet Mr. Brown in company with any of the other gentlemen that evening, Saturday evening? A. Yes, we all went over to the office that evening and talked until 11 o'clock about it. Q. What was said? A. It was a magnificent farm, and that it would give me a good income in the meantime. I went very heavily in debt to buy this [152] farm, I had only \$6,000. I borrowed \$32,000 in New York, and I had \$39,500 mortgage in this country, \$19,500 the first mortgage, and \$20,000 the second mortgage. Q. That is all right. We do not care anything about that. A. I would not have gone so heavily in debt only I wished to get the \$5,000 back, to make it easier. Q. When the Scheiber Brothers, whichever one it was, spoke of your getting \$5,000 back at the ranch, how did you understand you were to get that money? A. In money. Then I said, "I am in debt \$35,000, and it will pay me some money until I get something." Q. Was there any technical term used to you other than money, as to the \$5,000? A. No. Q. By check or anything else? A. No. Never until I owned the

(Testimony of Isabelle Garwood.)

farm did they talk about scrip, and I didn't know what they meant. Q. This was Saturday evening. Did you ever meet Mr. Brown in connection with the ranch other than that Saturday evening, that is, before you purchased it, before you got the money?

A. No, only the once. Q. That was the only time?

A. He went home that night. Q. Who was present

at the meeting in the office of the California Colonization Company on that Saturday evening that you thought this over? A. Dyke, Crane, the doctor, Brown and myself. Q. When you began to consider

seriously the purchase of this land, did you ever seek to get them to reduce the price? A. Well, yes, I

told them they ought to give it to me for \$100 an acre because it was wholesale, and they said they could not, it was very cheap at that price. Q. Then what

did you do? A. Then I said, "Won't you get them to take off the grain" and they said they would telephone them about it. Then Monday morning I asked

them if they had spoken about the grain and they said they would not take it off. And then I said, "Well, won't you get them to take off the animals,

I do not want the animals, I only want the land to [153] cut up" and Mr. Dyke said, "Do you suppose

when you pay \$125 an acre for \$600 acres of land, which is exactly \$75,000, do you expect to have an animal thrown in to an acre?" Those were his words. Q. Who said that? A. Dyke. Q. When?

A. On Monday morning, when he said he would not take off the grain. Then I said, "Won't you divide your commission with me because I really can't

(Testimony of Isabelle Garwood.)

spend so much money" but he said, no, he never divided commissions with anybody, he could not do that; and he said, "We are not being paid to sell the animals"; he would not let me have the ranch unless I took them, because the family were going to Europe. Q. Did you ever at any time tell Dr. Ramos to exert himself to get them to cut it down? A. I used to say to give me that money, get them to give it to me, because he said he thought it would be a good purchase, he thought the land would be valuable, and I said, "You get them to take off half the commission, because I must have something," but I did not get anything. Q. Did they ever make any agreement to split the commission with you? A. No, they did not. After they settled with the doctor and left, he said, "You ought to be ashamed of yourself, because you are taking so much of your time, you have had them have the automobile along, and you have taken so much of their time, and the land is valuable, what is the use of doing that? Q. Who said that? A. The doctor. Q. When did he say that? A. On the Monday morning after we talked it over. Q. What did he say, if he said anything at all about cutting this land up? A. He said they were going to cut it up during the Fair and Dyke was going to charge 25 per cent for cutting it up, and the doctor said he would not allow it to be cut up, he would cut it up himself to save money. [154]

Q. What did he say about making any money out of the land?

(Testimony of Isabelle Garwood.)

A. He said I would make three times what I was putting up.

Q. You say that the doctor said this?

A. Dyke said I would make three times what I was putting up, and then the doctor said, "Don't you know, even if you are paying a lot for it you are going to make so much, you are going to make three times as much." Q. The doctor said that afterwards?

A. Yes. Q. Did the doctor say anything to you about buying this land?

A. He said I would make a splendid purchase. Q. How did he put it to you,

about buying this land, that is, for instance, when you and Dr. Ramos were alone?

A. When we were alone? Q. What did he say?

A. He said, "You are going to make three times as much as you paid for it," and he said there would be an income from it, so that I would not lose in the end.

Q. Did I understand you to say a while ago, that he had upbraided you?

A. For finding fault, that there had been so much trouble,—he said he had never in his

life ever seen anyone in selling a piece of land ever take so much time and so much expense for automo-

bile hire and everything of that kind; he upbraided me about it and he said I ought to be ashamed to have

taken so much time. I remember that. Q. Do you

remember the occasion when you gave them the \$5,000 which you put up as earnest money when you

signed the first agreement to purchase the land?

A. Yes. First, they made it \$10,000, but the doctor said

\$5,000 was enough. I had not made the check out

(Testimony of Isabelle Garwood.)

yet. Then I wrote the check. Then they scratched it off the contract. I never had the contract, the doctor had it. It was amongst his effects after he died.

Q. At the time you handed over the \$5000 check, did you know anything about any money coming back? A. No, I positively did [155] not; in fact, I never knew that he got anything until after he died. He always told me, to the very last day, that he never got anything. Q. Just explain about the \$5000 coming back? A. What do you mean? Do you mean that they said he got half of it? Q. No, about the \$5000 that one of the Scheiber brothers told you would come back? A. They told me that if I would buy the farm, that because my levee was built—they were going to pay me 11 cents a square foot for it, which would be \$5000. Q. Who was going to pay you that? A. Whoever was building the levees. Because my levee was built, I was to be paid \$5000. I would not have to pay to build it.

Mr. HEWITT.—I would like to know just which \$5000 she is talking about.

The COURT.—I understood her to mean that \$5000 was to be paid at the time they closed the trade for the purchase of the ranch.

The WITNESS.—He was speaking before of that \$5000. That was the \$5000 Mr. Macomber was speaking of.

Mr. MACOMBER.—Q. The \$5,000 I was questioning you at the last was the check you gave at the time

(Testimony of Isabelle Garwood.)

you signed to buy the land. A. Yes, I put up \$5,000.

Q. I am speaking now about Monday, the 25th. A.

Yes, I put up \$5,000 for the land. Q. What month

and what year? A. The 25th of September, 1911.

Q. Where were you when Dr. Ramos handed that check in? A. When I made it I was standing along-

side of the desk in the Colonization office. Crane

and Dike were standing there, and the doctor was

alongside of me, and he picked it up, and I know

nothing more about the check. Q. Did you ever see

the receipt? A. I never knew what became of it.

Q. Was there a receipt given you which said, sub-

ject to the owners' approval, received of Miss I. Gar-

wood \$5,000 for 600 acres of land? A. I don't know

anything [156] about it. All I remember is that

I made out the check for that money, and I don't

know anything more about it. I had perfect con-

fidence in the doctor. He was attending to it. He

took the contract. I never had it. It was amongst

his papers. Q. They never asked you for a check

for \$3500, did they? A. No, never. Q. Did they

or did they not ever make any agreement with you,

or did you ever have any understanding with them

in respect to a division of the commission? A.

Never. I never heard of a division of the commis-

sion. I begged them to give it to me, but they re-

fused; they said they never divided commissions.

Q. And their refusal continued all the time, did it?

A. All the time. They never gave me anything. Q.

And thereafter, if you ever did, when did you ever

(Testimony of Isabelle Garwood.)

get any advice or information as to the fact that the doctor had received some money out of it? A. From Mr. Brown, in the latter part of October. Mr. Brown brought his contract to me three times. He was to be their superintendent for the corporation. And that induced me to buy the farm, too, because it would be so easy. The doctor said, "You will have nothing to do with it, he is the superintendent, you can go to England." They told me that they were all experienced farmers, that they could run the place for me. Then Brown came with the contract to the St. Francis hotel, where I was stopping at that time, and he said to me he wanted me to sign it—

Mr. HEWITT.—Your Honor, I do not understand what this testimony is in answer to. I ask that all of the testimony of the witness on that be stricken out. I would like to have an opportunity to object to these questions. When I object, the witness goes right along. I do not believe it is exactly fair treatment to counsel—I mean from the standpoint of the witness.

The COURT.—The witness must not continue to give her testimony when you arise to make an objection. I feel sure it will not be necessary to repeat that. Now, ask your question. [157]

Mr. MACOMBER.—Q. Miss Garwood, do not digress so much; just answer the question direct. A. It was when he brought me the contract to sign. Q. What did he say? A. He said, "How much did you pay?" I said, "I paid just what they asked

(Testimony of Isabelle Garwood.)

me, \$75,000 for the farm, and \$21,609 for the animals." He said, "Didn't you get any commission out of it?" I said, "No, of course not." He said, "Did anybody else?" I said, "Why, no, nobody." He asked me that each time he came. Finally the third time he said, "Are you sure you didn't get any," and I said, "No, I did not." He said, "Did the doctor?" I said, "Certainly not." He said, "Do you know that he did not?" I said, "Of course I know that he did not." He said "Somebody did." I said, "You mean to say that he did?" and he said, "Yes." I said, "I will prove that he did not, I will telegraph for him to come here." Q. Where did he say he received any commission? A. He said that Dike had told him he had given it to him. I telegraphed the doctor to come, and he came. He got there the following morning—

Mr. HEWITT.—We object to this as immaterial, irrelevant and incompetent.

The COURT.—I don't know whether any of the testimony in reference to that matter would be admissible, I cannot tell until after all the testimony is in. They will have to show that there was bad faith and fraud practiced by the doctor, and that she was deceived by her agent; in other words, the allegations of the complaint will have to be established. Proceed. I will overrule the objection for the present.

Mr. MACOMBER.—Q. Did Mr. Brown state to you why he came to you with his troubles? A. He

(Testimony of Isabelle Garwood.)

Q. (Intg.) Why was he concerned in the matter at all? A. He said, "I don't know what your arrangement with the doctor is, or what your connection with the doctor is, [158] but he got the commission." I said, "I don't believe it, and could not believe it, and I will make him prove it if he did." I said, "If it is so, I will not marry him, and then"—

The COURT.—That testimony will be excluded. You can make proof that she was informed that somebody got the commission, and that thereupon she investigated it. All the conversation between the witness and Mr. Brown in the absence of the defendant is not admissible, and I will sustain the objection.

Mr. MACOMBER.—But as to what was said by Dr. Ramos will be admitted, will it?

The COURT.—I will admit that subject to the defendants' objection.

Mr. MACOMBER.—Q. When Dr. Ramos arrived, state what happened. He was very indignant. I said, "Do you know that Mr. Brown accuses you of having received a commission?" He said, "What, and you sat and listened to him, you should have kicked him out of the house; would I listen to anybody say anything against you?" I said, "I did; I telegraphed to you immediately to come and say it was not so." I said, "He is coming here at three o'clock this afternoon, to hear the truth." I was very indignant with him. He said, "Now, I remember"; he said, "Do you remember what Crane said,

(Testimony of Isabelle Garwood.)

that I would make a fine agent, and that if I made sales for him he would give me a commission; maybe he will, but I have not heard of it. Now that is the truth."

Q. At the time the formal contract was signed, do you remember an occasion of your being in Mr. White's office in company with Dr. Ramos and Mr. Dike and the Scheiber brothers? A. Yes, sir. Q. When was that with reference to the date you paid the money? A. It was on the 27th day of September." [159]

Q. That would be two days subsequent to the time you paid the \$5000? A. Yes, sir. Q. Who all were present at that meeting? A. The Scheibers, the doctor, Mr. Dike, Mr. White and myself. Q. The three Scheiber brothers, you say, were there. Which do you mean? A. The men I bought the ranch of. Q. Are you sure that all three were there? A. I think there were all three there. Mr. White said the other day he thought there were only two there. I think they were all there.

Q. You know that some of them were there, do you? A. Yes, sir. Q. Do you remember the occasion of Mr. White reading this agreement? A. Yes, Mr. White read the agreement. He read, "600 acres, more or less." I had never heard anyone use that expression before. I never heard that expression before in my life. I beat on the table to attract attention, and I said, "Stop right there, Mr. White, I never agreed to buy 600 acres more or less, I agreed

(Testimony of Isabelle Garwood.)

to buy 600 acres of the finest alfalfa land in the state for \$125 an acre." He very deliberately stood up, turned his back, put a book on the shelf and faced me and said, "Miss Garwood, it means 600 acres, that is only a law term"; and I signed it, thinking he was my lawyer.

Q. Are you sure that is the truth? A. I swear to it. Those are the very words. Q. Did any of the Scheiber brothers dissent from that? A. Nobody spoke at all, nobody said a word. Q. And you are sure of that? A. Yes.

Q. And that is all that was said about "more or less"? A. That is all that was said. Q. In reference to the personal property, you bought personal property at this time, as well as the land, did you? A. Yes, everything. Q. How came you to buy the personal property? A. Mr. Dike said, and they told me themselves, they were going to Europe, they were tired of [160] work and were worn out, and they wanted to go back to Europe and live there; and they asked me if I thought their wives—

Q. (Intg.) Now, that is all right, you are digressing. I am speaking about the personal property. A. I said, "Why do I have to take the animals?" They said, "Well, we wouldn't know what to do with the animals after the land was sold, they have to go with it." I supposed that was true. They would have no place to put them after the land was gone. Q. When did that conversation take place? A. That conversation took place on the ranch the first day I was there. Then Dike told me always that they

(Testimony of Isabelle Garwood.)

would not sell the ranch unless the animals were sold, too, because they were going to live in Europe, that they were worn out and tired of work. Q. And you had to buy the animals? A. I had to buy everything. Q. You had to buy the personal property or you could not buy the land. Do you remember what you paid for the personal property? A. \$21,609. Ramos lived until the 29th day of May, 1912. At the time of this transaction he was not sick as far as I know. He was 53 years of age, he was large and fine looking, he was highly educated, very cultivated. He had been an officer in the English Army before he was a doctor. He graduated from the New York University, from Boston—from Harvard. He was with Dr. Loomis as a post graduate in the hospital in New York. I had perfect confidence in Dr. Ramos. I never before had any occasion to mistrust him. I never mistrusted him in my life. I had never had any experience in buying farm lands; I never saw a farm before in my life, and I had never seen animals before, except, perhaps, in railroad cars, and as I passed along the road. I had only been in California for a week or so just before. I arrived in San Francisco about the 14th of September, but I am not sure. I sprained my ankle the day after I [161] saw Dike, then I went back to San Francisco and was in bed in the hotel. My ankle had been set in Sacramento, then I had it set again just before I went out to Sacramento to meet the doctor. I could not walk on it, I just hobbled on it. It was in the early part of February, 1912, that I

(Testimony of Isabelle Garwood.)

was told that there was only 450 acres to the place. Since purchasing this land, I have paid reclamation assessments for keeping the water off the land. I paid \$16,104, in February, 1913, and I have to pay \$10,000 more. On that \$16,000, I was credited with \$5,000, but when they promised me the \$5,000, I thought they were going to give me money; I was very much surprised when I found it was scrip. I could not pay the \$11,000 right away, and I let it go until the following December, and had to pay \$700 extra, and now on April 1st they charged me \$10,000 more.

The document marked Defendants' Exhibit "E" for identification was introduced by plaintiff and marked "Plaintiff's Exhibit 4."

Mr. MACOMBER.—Q. Now, Miss Garwood, with reference to any representations which the defendants made concerning this land, did they ever give you a circular? A. They gave me that book you have in your hand. Q. Do you recognize this book? (Addressing counsel.) This is the circular. (Handling.)

Mr. HEWITT.—I understood that your Honor ruled that that was not competent. I understand that it is a prospectus gotten up by real estate people. That matter was up the other day.

The COURT.—I do not think that that is such a representation that would be binding upon the defendant, unless you show they authorized it to be inserted as it is there inserted, or that they knew that

(Testimony of Isabelle Garwood.)

it had been so inserted and published to the world. I will admit it subject to objection, and if the plaintiff does not bring herself within the rule I will exclude it. [162]

Mr. MACOMBER.—Shall I read this into the record or shall I let the reporter copy it into the record?

The WITNESS.—They gave it to me before I bought the land; when I was talking about buying the land they gave me that.

The COURT.—Q. Who do you mean by “they”?  
A. I mean Dike. He gave it to me to identify the land that they wanted me to buy.

Mr. MACOMBER.—What does it say about the land?

The COURT.—Don’t stop to read it. Just introduce it. A. It represents 600 acres of subirrigated land in Sutter County.

Q. Is that what they gave you? A. The soil is deep.

The COURT.—I will have to read it anyway. No use of the witness taking the time to read it. It may be marked as an exhibit. (The circular introduced in evidence and marked, “Plaintiff’s Exhibit 5.”)

Mr. MACOMBER.—Q. Now, Miss Garwood, what representations were made to you, what was said to you, rather, at any time, by Dr. Ramos, or Mr. Dyke or Mr. Brown or Mr. Crane, in reference to the stock, personal property on the land? A. Why, they were going to take it over as a corporation. Q. We won’t go into that. What did they say? A. They said that it was all first-class. I was only on the ranch

(Testimony of Isabelle Garwood.)

once prior to the day I paid the earnest money. The only time that I was on the ranch was the 21st day of September, 1911. The next time I was on the place was the 31st day of October, the day before I paid the money; we went up to look at the animals, and one of the Scheibers met us with a carriage and we drove to the stacks, and then Mr. Dyke measured them off, Mr. Dyke and Mr. Scheiber." On that trip Mr. Dike, Dr. Ramos and myself made up the party. we went by rail, and Mr. Scheiber met us at Nicolaus and drove us [163] over to the stacks and Mr. Scheiber and Mr. Dike measured them and then they drove us over to the old barn. Mr. Scheiber drove me and the others walked and when we crossed the road there was a big slough there, and I said, "Well, Mr. Scheiber, you told me there was nothing bad about the farm."

Q. We are getting away from the question. We do not care anything about that. Just confine yourself to the questions that I propound to you.

The COURT.—I would like to know what he said about that, for my own information.

A. I said, "Why, you said there was nothing bad about the farm, look at this big hole, there is another big hole near the house." He said, "that is a hole we had to dig for the animals, and this slough, we have to have sloughs"—by the time he finished saying that we were in the alfalfa field where the horse barn is and he said, "it is all good clear level land like you are looking at," the same remark as he made the first day I looked at the farm from the porch.

(Testimony of Isabelle Garwood.)

Q. Who measured out the alfalfa? A. Mr. Dike and Mr. Scheiber. Q. What did you and Dr. Ramos do? A. I was alone in the carriage when they measured it.

Q. Where was Dr. Ramos? A. He was out with the men; there might have been two or three of the Scheibers there. I think Morris had gone to the head of the horses.

Q. What else was done about the animals? A. When we reached the old barn they drove out some of the horses and of course I was no judge of horses at all, there was one horse standing on the bank and I said "Aren't you afraid he will fall down that embankment into the water" and they laughed.

Q. What did the Scheiber Brothers say to you if anything in respect to the land being capable of raising alfalfa without any irrigation? A. I asked them if they needed any irrigation and they said no. [164]

Q. Who said that? A. Morris Scheiber.

Q. What did Mr. Dyke say or Mr. Crane or Mr. Brown at the office on that Saturday evening about that?

A. They said it was all the best alfalfa land in the state and needed no irrigation and they said there would be no assessments. I thought they meant a road, because they were going to cut a small road through there; I thought they meant I would have to pay for the road—they said no, there was no assessments. I didn't know there was no water—I didn't know I would ever be assessed for water.

(Testimony of Isabelle Garwood.)

After I had served them with a notice offering to rescind, I was served in turn by them on March 12, 1912, with a written refusal to rescind. (Defendants' written notice of refusal to rescind was at this point admitted in evidence, marked, "Plaintiff's Exhibit 6.") The first time I had ever been upon the levee was at a time after I learned that there was land outside of the levee. That was in February, 1912. That was the first time I knew there was land outside. Mr. White first spoke to me about the levee sometime after the first of December, 1911. He said, "There may be something about the levee, they may scoop out on the outside, and it takes five years to fill in." That was the first time he ever mentioned the levee. He never mentioned the money. I told him I was going to get \$5,000 back and he said, "I don't know anything about it, I thought it was one thousand." He met me in the street, and he said, "You are going to get \$5,000." That must have been the latter part of November, after I bought the farm. At the time of commencing this action I was a citizen of the State of New York. I believed implicitly every word that they said and what they said was exactly what they showed me in their book, and I believed everything, otherwise I would not have bought the place. Dr. Ramos and Mr. Crane were very chummy, they said they liked each other very much. They spent a portion of [165] their time in the bar opposite the hotel. I used to see them going there. I saw them go in and out of the bar, and the Doctor told me they had

(Testimony of Isabelle Garwood.)

been in the bar. The Doctor told me to keep away from that realty office. Not before I bought the farm, but after I bought the farm, the Doctor said to me, "Never go into that office, those are common men, and don't you ever go in." He told me that repeatedly. I have never been engaged in business in my life of any character whatsoever.

Cross-examination.

I first learned of the \$5,000, which I was to be allowed on account of the old levee, before I bought the farm, that was one reason why I bought it. I first learned of it the day I went to see the farm. Even before I went to the farm, Dike told me I would get \$5,000 back, making my indebtedness \$35,000, instead of \$40,000, that was on the way to the farm. He said, "You will get \$5,000, back for the levee, because it is built." He said, "You have nothing to do, nothing to pay, and you get \$5,000 back." At that time I had never had any experience at all in land matters, or any business; I knew nothing about land, or business. I knew he was telling me that I would get \$5,000 back, and that satisfied me that I was making a better bargain if I got \$5,000 back, than if I got nothing. I was positive I was going to get \$5,000 in cash. He told me that on the way to the ranch, and the Scheibers told me on their porch. At the ranch-house one of the Scheiber brothers said to me, "If you buy the ranch, you get \$5,000 back, and you pay nothing out." They said that it was because the levee was built. The other

(Testimony of Isabelle Garwood.)

people have to build the levee, and you get your \$5,000 back and pay nothing out. He did not say any rate that was to be paid, he said I would get the \$5,000 back. He didn't say so much a square foot, or so much a square yard, but only I would get the [166] \$5,000 back, because my levee was built. I supposed the money was coming from the people who were going to make the other people build levees. I never heard of a reclamation district in my life before that, and I did not hear of it then either. If he had mentioned a reclamation district, I would have asked him what he meant. He said I will get the \$5,000 back, because my levee was built. I was not curious to know who was to pay it, I only believed everybody who talked to me. Q. You are quite positive that was the first time you went to the ranch? A. I am positive that I was never on the ranch but once before I took the animals away, and that was the time before. Q. That was the day they told you? A. Yes. Q. Are you as sure of that as you are of other things you have testified to. A. I am as sure of that as I am that I am alive. Q. \$5,000 was of some importance was it not. A. Yes it was. Q. It was then? A. Yes, it was then. Q. Was there something said to you by somebody about that time about an allowance for a road? A. They said they had sold my land for a road and I would get money for that, \$250. Q. Who said that, do you remember? A. The Scheibers; I think Morris was the spokesman. Q. At the ranch on this first occasion? A. On that first visit. Q. Now,

(Testimony of Isabelle Garwood.)

what did they say about who should stand the assessments or how the taxes should be divided and what you should pay and what they should pay, and what the Scheibers should pay, on the porch? A. They never spoke about assessments, they did not speak about taxes. Q. Did they speak about taxes? A. No. Q. Did not speak about taxes? A. No. Q. You don't recall anything they said about the taxes? A. No. Q. Is it not a fact that [167] they represented to you if you bought the property that it should be free from taxes or assessments except— A. No. Q. Just a moment—except the taxes for the year 1911 would be prorated, they standing two-thirds and you one-third of those taxes? A. That was when I bought, they paid me back a part, they paid back \$30; that is always the way when you buy property, you only own from the time you buy it. Q. I will ask you what was agreed to on this particular occasion? A. I am telling you. They said I would get \$5,000 back and pay nothing out, and I don't remember anything else. Q. You don't remember anything about the taxes? A. No. Q. Nor what proportion of the taxes you were to pay? A. No, I had no thought of buying the farm then, they were simply inducing me to buy it. Q. The day you made your agreement to buy it, was anything said about what your share of the taxes would be? A. The agreement was afterwards; we are talking about the first visit. Q. I say the day of the agreement. A. The day the agreement was made it was agreed that I was to get \$30 back for back taxes.

(Testimony of Isabelle Garwood.)

Q. \$30. I was to pay the future taxes and get the back taxes. They handed me \$30. Q. That was the date of the deed, was it not? A. It was understood when the agreement was made what they were to be.

Q. Then at the time the agreement was executed in Mr. White's office, there was something said about your getting back taxes, was there not? A. You

were speaking about the first visit to the farm. You

asked if there was anything said. Q. No, at the

time that was executed? A. In Mr. White's office,

yes; I did not understand the question. Q. What

was said about the taxes at that time? A. I would

get back for the time that had elapsed before I bought

the farm. Q. In what event were you to get this

back? A. In case I bought it. [168] Q. Was it

not understood that the taxes for the year 1911 were

to be apportioned, you to pay one-third of the taxes

and the Scheibers two-thirds of the taxes for that

year? A. Yes, I was to pay for the parts that I

would have. Q. If you did pay all the taxes they

would rebate to you their share? A. I don't know

enough about business to know. Yes, the property

was subject to a first mortgage of \$19,500, and a

second mortgage of \$20,000. Yes, I certainly did

know that I was to get \$5,000 back, and I knew that

before I made any deposits at all on that property.

Dr. Ramos knew it, everybody knew it, it was told in

public. They said it would come back to me, but

they did not say when. Q. Why wasn't it in your

contract that was made in Mr. White's office? A.

The \$5,000 was to be paid, they said it would come

(Testimony of Isabelle Garwood.)

back to me but they did not say when; they said it would come back to me, you will get \$5,000 back, because your levee is built. Q. You signed a contract to pay \$35,000 for the ranch and it don't mention a word about the \$5,000? A. They told me it

was coming back. Q. You did not ask to put it in writing? A. I am not a business woman. Q. You had Dr. Ramos there? A. Dr. Ramos, it appears, was not on my side. Q. And the \$5,000 was an important item to you? A. A very important item to me. I believed their word, it was coming back to me.

Q. Was there or was there not, in the contract dated September 27, 1911, anything about that \$5,000? A. I don't know. Q. You don't know? A. I don't know; I know only I bought it because they told me I would get—\$5,000 was coming back to me; Mr. Dyke told me; he was the agent who sold it to me; he told me “You will get \$5,000 back because your levee is built.” Q. Now, Miss Garwood, isn't the first time you heard about that \$5,000 the time that Mr. White told you about it? A. No, sir. Mr. White never spoke to me about it until I spoke to him long afterwards. [169] Q. You did know about it before? A. I knew it about the first day I went on the farm, before I reached the farm; it was one of the inducements to buy it. Q. Now on the 25th of September, 1911, you concluded to buy this property, didn't you? A. Dr. Ramos said he thought it was the best thing to buy, and accept the pay in full price and I said, “All right, if you think so.”

(Testimony of Isabelle Garwood.)

Q. Did you at that time conclude to accept, pay the full price? A. I did pay the full price. Q. Did you at that time conclude to pay the full price? A. Yes, on the 25th of September. Q. On the 25th of September? A. Yes. Q. Provided was it not, that the California Colonization Company could not get it for less? A. I had not said I would buy it before they said they could not get it for less. Q. Miss Garwood, when you gave them the \$5,000 on the 25th of September, 1911, was it not with the understanding— A. (Intg.) That was after they refused— Q. (Intg.) Pardon me will you please, Miss Garwood; was it not with the understanding that they were to try to get the purchase price reduced, even then? A. No. Q. It was not? A. No. Q. Was it not with the understanding that they should try to have the hay on the ranch included in the purchase price? A. No. Q. It was not? A. No. Q. You are positive of that? A. Positively no. Q. How much did you pay them on the 25th of September? A. I paid \$5,000. Q. When did you pay them the next \$5,000? A. I never paid them \$5,000 more. Q. On the next day weren't you to have paid \$5,00 more? A. No. Q. On the next day did you pay them \$5,000 more? A. No. Q. Didn't you back \$5,000 that you paid them on the 26th of September, 1911? A. No. When the contract was made that first day, on the 25th of September, they said [170] "Make it out \$10,000" and I wrote it out \$10,000, and then the doctor said, "don't give them that \$10,000, Dyke may steal half of it, you

(Testimony of Isabelle Garwood.)

make it \$5,000, \$5,000 is sufficient; don't give them but a check for \$5,000; I am not willing for you to give them \$10,000," and then I made it \$5,000.

Q. Did you on the following day write out a check for \$5,000 and hand it to them. A. They gave me

the other check back. Q. They gave you the ten thousand dollar check back? A. It was already

drawn up. Q. Are you positive about that? A. I

am positive I paid only \$5,000. Q. I am not asking

you that; I am asking you if you did not give them

\$5,000 on the next day? A. If I gave them a ten

thousand dollar check I got it back when I gave the

five thousand dollar check; the doctor objected to

my paying \$10,000, he said they had no business to

ask me for \$10,000, and I took that back and paid

\$5,000. Q. You are quite sure of that point? A.

I mentioned that the other day. Q. I will ask you

again, didn't you on the 25th day of September pay

them \$5,000 and didn't you on the subsequent day,

the 26th day of September pay them \$5,000 more,

and didn't they on the 27th day of September, return

one of those five thousand dollar checks? A. They

returned a check which I tore up, but I never paid

them but \$5,000; the first check was made out for

\$10,000. Q. Can't I get an answer to that question?

A. I have answered it. The first check was made

out for \$10,000. The doctor refused, he said they

had no right to \$10,000. He said, "Dyke may steal

part of it or steal all of it, it is such a large sum, only

give him a check for \$5,000," which I did. The

check was made out at the time. Q. Will you say

(Testimony of Isabelle Garwood.)

now that you ever gave them one check for \$10,000?

A. I say that the first day they asked me for \$10,000, and it was written at the bottom of the contract \$5,000 returned.” [171] Q. You know that?

A. \$5,000 returned and \$5,000 accepted. Q. How did you know that? A. I saw it written at the bot-

tom of the contract. Q. Did you first give them a check for \$5,000 on the 25th of September and no more? A. If I had given them a check for \$5,000

I never would have increased it to \$10,000, if the check was \$5,000. Q. Didn't you on the 26th of

September, the following day, give them a check for \$5,000 more? A. No, I did not, unless I got the first check back. The first check was for \$10,000 and the

second check was \$5,000. Q. Didn't you finally on the 27th of September get that last check? A. No,

the 27th of September the check was handed in at Mr. White's office \$5,000. Q. I show you a document, Miss Garwood, marked Defendants' Exhibit

“B” for identification dated “Sacramento, Cal., September 25, 1911” and call your attention particularly to the bottom; is that the memorandum,

that is, a part of it scratched off, that you are speaking about? A. Well, I did not pay it; I was to pay

\$5,000 probably the next day but did not. The doctor said \$5,000 was sufficient, “Don't give any

more.” Q. Pardon me. Will you answer my question which was that the memorandum on which you

say that the receipt for the \$5,000 was scratched off at the bottom of the contract—is that the contract?

A. I don't know whether it is or not. How do I

(Testimony of Isabelle Garwood.)

know. Q. You say you saw the document? A. I could not tell you; it is four years ago; I never expected to see it again in my life. The doctor said "they have demanded too much money, don't give them that."

Q. Is that your signature at the bottom of that contract? A. I do not see my name there. You mean of that? Q. Yes. A. That is mine.

Q. Examine the document? That is my signature.

Q. Is that the contract, where you see at the bottom of it— A. I saw that they had written something, I did not read it. I know I only gave them \$5,000.

[172] Q. Then you did not read what they had on the bottom of the contract? A. I suppose I did at the time, I don't remember; I know I gave them \$5,000 and they wanted \$10,000, and the doctor said, "Don't give them \$10,000; give them \$5,000; "Dyke will run away with it; don't give but \$5,000"; "I never gave but \$5,000."

Q. Didn't you say that you saw Mr. Dyke scratch off "receipt" at the bottom after the check was returned, the five thousand dollar check was returned to you? A. I remember I only paid \$5,000; you cannot tax me any closer than that. It is four years ago, and I never expected anything to come back. I thought I was buying in good faith.

Q. When did you sign that document? A. I don't know; I signed it and went away and told them I would not give them any more money.

Q. Did you sign it when you gave them \$5,000?

A. It must have been when I gave the \$5,000. I don't remember altogether about the receipt. (Defendants' Exhibit "B" for Identification.) It has

(Testimony of Isabelle Garwood.)

something scratched off at the bottom. What I do know is the Doctor took all the papers, I never looked at them. I know they wrote something at the bottom of the paper. I know positively that they first wanted \$10,000, and it was finally decided I would pay them \$5,000 which I paid them on deposit, and that is all they ever had until the final money was paid. I remember there was something scratched on the bottom, but I never read it or paid any attention to it. I think that was the paper that was found among the Doctor's effects after he died. I never had it. He had it in his possession. I know I paid them \$5,000. They wanted \$10,000. That really was not money, it was simply put there as money, but the money was in New York. First, I was going to give them a check for \$10,000 which I probably did, and afterwards it was changed [173] to \$5,000, because the doctor said not to trust them with \$10,000; he said he did not think Mr. Dike was honest; if he got too much money he might disappear. I have told you over and over again I don't know what kind of check was returned to me on the 27th. I know I paid \$5,000 only. If the check was returned to me it was torn up.

(At this point Defendants' receipt introduced in evidence, marked, Defendants' Exhibit "B.")

Mr. MILLER.—Q. Now, Miss Garwood, after examining this receipt, I will ask you whether or not you desire to make any correction in your statement that you did not request the California Colonization Company to try to secure this property for less than \$75,000 for you? A. Before I bought the property,

(Testimony of Isabelle Garwood.)

I tried very hard to get them to take less. Q. Now, on the 25th of September, 1911, when you deposited the first \$5,000, didn't they give you a receipt in which it was stated they were to secure it for less if they could secure it for less? A. That might have been, I don't remember, but I wanted it as cheap as I could get it. That is all I know about it, and I tried in every way to get it. Q. Didn't you also at the same time try to get them to include the hay on the ranch? A. I was only going to buy it providing they got it cheaper. I tried to get the animals off if I could, and I tried to get them to take the hay off, if I could. Q. I call your attention to the first paragraph of this receipt. "Received from Miss I. Garwood the sum of \$5,000, being deposit and partial payment of the total sum of \$75,000, or as much less as can be secured, as the purchase price of the following-described property—600 acres, more or less, situated on the east side of the Feather River in Sutter County, about 1½ miles south of Nicolaus, and known as the Scheiber Brothers ranch," and then written just in the division there, in connection with the same, "Price includes hay on ranch." Was that part of the understanding? [174] A. Price includes the hay on ranch. I paid \$3,000 for the hay on the ranch. Q. This is dated September 25, before you made and payment. You wanted them to include the hay on the ranch? A. I wanted them to include the hay on the ranch. The document was read over to me. Mr. White's office was a small room. The room was about 11 feet wide and 20 feet long. On the right-hand side as you entered, there

(Testimony of Isabelle Garwood.)

was a large safe. On the right-hand wall, beyond the safe was a bookcase containing a number of volumes; I think that is correct. I do not know whether the books extended clear to the east wall of the room. There was a bookcase at my left on the other side of the room. When I went into the room I faced Mr. White's desk, which was at the extreme end of the room. Mr. White usually sat back of his desk next to the window, facing me. That was his position. The desk was between myself and Mr. White, yes. The others were sitting with me. Mr. Dike was walking back to the window, yes. Possibly Mr. White's desk was about  $5\frac{1}{2}$  feet long, and about 3 feet wide, and covered with documents and books and papers. No, sir, Mr. White did not pick up a book that was in the way, so that I could sit at the desk and sign the document. Mr. White may have said that he didn't know the land; that it was in a good neighborhood, that alfalfa was a good thing in California; I don't know. I stopped the reading of that in the beginning when he said more or less. I said, "Stop right there Mr. White," then I said, "I never agreed to buy more or less, it was 600 acres of the finest alfalfa land in the State at \$125 an acre." Then he picked up the book and turned deliberately and put it in the shelf and turned around again and said, "Miss Garwood, it means 600 acres, that is only a law term." That is all he said about it. Further on it read "free from all encumbrances." I heard the document when he read it. [175] I have never read the document. I heard the words "free from all encumbrances" at that time, and not since; I have

(Testimony of Isabelle Garwood.)

never read the document at all. I am sure it said "free from all encumbrances." I would not have gone ahead with it had he said it meant 600 acres more or less. I am sure I would have thrown up the bargain that day. The original receipt, which I signed, says 600 acres more or less. That original one I did not read, but when I heard him read it I stopped him. Mr. White did not tell me that 600 acres more or less meant that whatever that ranch was. His words were "that the 600 acres more or less was simply a law term." Mr. White did not tell me that 600 acres more or less meant that if the ranch contained more than 600 acres, I would get all that it was, and if it contained less, I would get all that it was. He did not tell me that. The only thing Mr. White said was that 600 more or less was simply a law term—that it meant 600 acres. Yes, my educated friend, Dr. Ramos, Mr. Dike and the three Scheiber brothers were all there, and heard Mr. White make that explanation of the words "600 acres more or less." Yes, they were all there. Nobody said anything. He said 600 acres more or less was simply a law term. Yes, I heard it read that a strip of land 40 feet in width was to be taken for the purpose of a road, and it was understood that I accepted the land subject thereto, and that I was to receive \$250 for that. Yes, I accepted that. I did not say anything at that time about the \$5,000 for the levee. The Scheibers told me about the road in advance, the same as they had told me I would get the \$5,000. In my direct examination I did not say

(Testimony of Isabelle Garwood.)

anything about any district at all. They said, "If you buy that land, you get \$5,000 back, because your levee is built." I never said anything about a road district. I never heard anything about a road district at all. I never inquired where I was to get that [176] money back from, because my levee was built they told me and I did not need to inquire. Mr. Scammell was the first one to tell me that the land was in the reclamation district. I had a letter from Mr. White telling me the time was not perfect, and I wrote him I would not take the land, I did not want the land at all; then he wrote me about perfecting the title. He told me the title was not perfect, and I wrote back and told him I did not want the land. I don't know whether he sent me an opinion of title or not. They did not mention the mortgage or taxes that day; that was mentioned in the agreement. Mr. Dike told me the first night I talked about buying the property that there would be no assessments. The first time I went on the property I was not interested in it at all. Q. By the way, when you went upon the ranch the first time, were you interested? A. Not at all. Q. You did not pay any particular attention to it? A. I did not want it because it had animals on it, but they wanted to show it to me because it was such excellent land for cutting up, 600 acres. Q. You say you was not interested? A. I was not interested, no. Q. You did not pay much attention to it? A. I had no more idea of buying it than I had of flying when I left the ranch. Q. You went up on the ranch, and you met one or

(Testimony of Isabelle Garwood.)

two of the Scheiber boys and their wives? A. Yes.

Q. And you had some conversation with someone there? A. Yes. Q. In reference to the ranch?

A. Yes. Q. You asked them to point out the boundaries? A. Yes. Q. What did they say? A. They

said right along the green line to the white house, meaning their stable, running down that line to the trees and across from the trees up to the grove.

Q. Across the trees to— A. (Intg.) The trees at the boundary—from that fence to the grove. Q.

What did they say about what [177] river it was, if any? A. They never mentioned a river. Q.

They did not say whether it was the Sacramento River or the Feather River? A. They never said a word about it. Q. Didn't they say along that green

line, along the Feather River? A. No, they said the green line. I didn't know anything about that.

Q. What was the green line—the green line was the trees, was it not? A. The green was right along—

it was the green line right along—you could see it from the fence. Q. Do you mean to tell me the levee

was green, that it had any trees on it at that time? A. The trees were back of the levee, just the same

as I had seen them on the Sacramento River the day before. Q. Was there a river there? A. I thought

it was the Sacramento River at the time. Q. You thought at that time? A. I thought it was the Sacramento River. Q. Then you knew there was a river

there? A. I said I thought it was the same river that I was on the day before. Q. How did you know

there was a river there? A. Because they told me

(Testimony of Isabelle Garwood.)

it was a levee, and I thought the levee was along the river. I never knew a levee was along land. Q.

How did you know that there was a river there?

A. Because they told me it was along the river—they told me it was a farm of subirrigated land along the river. Q. When they pointed out the boundaries,

they told you “that green line over there,” and they pointed in the direction of the levee? A. In the direction of the levee. Q. And the green line was trees

beyond the levee? A. I took it that they were trees on the slope of the levee, the same as I had seen the

day before, going down the river. Q. According to your statement, you said they pointed out a green

line. A. They pointed out a green line and then they afterwards said, “Don’t you see it rises up there,

along there, the green line, it rises”; then I knew the levee ran up apparently right to that stable of

theirs. They asked me [178] to buy the other 140 acres— Q. (Intg.) Did they ask you to go

upon the levee? A. No, there was nothing said about that. Q. Mr. Dike asked you to go upon the

levee. A. Mr. Dike asked, in passing, would I walk up and look around the country, and I said no, I

wanted to go to the ranch, I could not walk up the hill, on account of my ankle. Q. Mr. Dike, are you

sure he used the words “around the country”? A. In the first place, I didn’t understand his ques-

tion altogether, it was simply, “Would you like to take a walk up and look around,” that is what it

amounted to, and I said, “No, I want to see the farm,” and I said, “My ankle is too sore, I could not

(Testimony of Isabelle Garwood.)

walk up a hill." Q. Then he did invite you to go up on the levee? A. No, only in a general way, passing.

Q. How close were you to the levee at that time? A. We were *coming the angle* into the farm.

Q. You were within 20 or 30 feet of it, were you not?

A. Yes. It was steep, and he knew I could hardly step on my ankle, on my foot.

Q. You had been going into his office, had you not? A. I had been limping over, but that was not walking up a steep hill,

and my ankle was very sore. Q. Now, you went there, and upon finding the stock, you were not interested, you say?

A. I never saw the stock. Q. When you found that there was stock there, you were not interested, you say, in the ranch?

A. I was not interested. The doctor said, "We will go and look at it, it is good land to cut up, that is the main thing."

Q. In spite of that fact, you made some inquiries about the boundaries of the land from them?

A. I wanted to entertain them, they sat there and said nothing to me, and I was left there, and I said, "Where is this land"?

Q. You saw some alfalfa there, didn't you? A. Why, in the distance, yes.

Q. How far? A. Not near the house, over in the field toward the levee.

Q. How far from the house? A. Well, I should [179] think it must have been around the pig sties.

Q. About how far from the house where you were seated? A. I could not judge very well, it might have been a quarter of a mile; it certainly would be away up beyond the farm.

Q. By the way, from where you were sitting when you were talking about the descrip-

(Testimony of Isabelle Garwood.)

tion of the land, it was a half a mile to the land that you spoke of, was it not? A. I should judge so, I am no judge of land.

Q. It was quite a good distance away, was it not? A. Yes, I think it was.

Q. Hadn't you been along that alfalfa? A. No, we drove in through the woods, through the grove,

through the pig-sty. Q. But you could see the alfalfa? A. Well, we drove along some alfalfa.

Q. You said to one of the Schieber boys, whichever one was there, "How many acres of alfalfa have you got"? A. No. After I bought the land, on the 4th of December, I asked Mr. Scheiber, when I was riding in the carriage to the depot— Q. (Intg.)

The witness is not answering the question. I did not ask you that, Miss Garwood. A. I did not. I did

not ask how many. Q. Miss Garwood, you have so far testified many times as to the number of acres that were represented to you as planted to alfalfa.

In your complaint, you have sworn it was represented to you as 250 acres. As yet, you have not said who

represented to you that there were 250 acres. A.

Mr. Dike told me that there were 250 acres. The Scheibers that day that we were there, not when they

were talking to me on the porch, but they told the doctor there were 250 acres, but 50 acres had been

washed out when the levee broke. Q. And there were 200 acres left? A. 200 acres of alfalfa left.

Q. Was that on the first day you were up there? A. Yes.

Q. Then you asked them in reference to the alfalfa, "Is the alfalfa all the same as what I see here"? A. No.

Q. And they said practically—

(Testimony of Isabelle Garwood.)

A. (Intg.) No, I did not ask him. Q. You did not [180] ask him? A. I said, "You told me all the good things about the land—" Q. (Intg.) I beg your pardon, the first day I am talking about. A. I never asked them that, no. Q. The first day? A. I asked them the character of the land. Q. Didn't you, the first day, ask how many acres there were in alfalfa? A. No, I said, "What kind of land is this?" And they said, "First-class alfalfa land." Then they told me further about the land. Q. How did the conversation come up, in which they said there had been 250 acres in alfalfa and 50 acres had washed out? A. They told the doctor that 50 acres had washed out, and they told Dike when there was a break in the levee. Q. How did that conversation come up? A. I don't know, I was not listening. They were not talking to me. Most of the time when I came around they stopped talking business, and talked about going to Europe with their wives. Q. Where were they going? A. To Europe, going to live in Switzerland. They were tired of working. Q. You said in your direct examination that they said they were going to Germany. A. Germany or Switzerland. They asked me if I spoke any German, their wives were of German descent, they were going to live abroad. Q. Did they at that time tell the doctor and Mr. Dike in your presence that there were 250 acres originally, but that 50 acres had washed out? A. They said that 50 acres washed out when the levee broke once. Q. They did not represent there were more than 200 acres then? A. No.

(Testimony of Isabelle Garwood.)

I understood there was only 200 acres when I bought it. Dike told me that before I bought it. Q. In speaking of alfalfa with the boys, didn't you say, "Is all of the alfalfa like this"? A. No. I said, "Is all of the land"—they told me all the good things about the land, and I said, "Now, you have told me all the good things about the land, is there anything [181] bad about it?" and they said, "There is nothing bad about the land, Miss Garwood, it is all good, clear, level land like you are looking at." Q. This was in a conversation that occurred in October? A. No, the same conversation occurred before; they repeated this in October as I told you before—they repeated this in October—in October they were in the old barn, old horse field where the old barn was and they said that this was all good, clear, level land like you are looking at. Q. What brought about this conversation on the 21st of September, 1911, in which you said to them, "You have told me all the good things about the place, now tell me if there are any bad things?" A. I was trying to entertain them, and I said, "Where is this land?" Then I said, "What kind of land is it?" They said, "It is all good, level land"; then they told me everything that was good about it, and I said, "Now, you have told me lots of good things about this land, what is there bad about it?" and they said, "There is nothing bad about it, it is all good, clear land like you are looking at." Q. I will show you the original complaint in this action, No. 15,701, marked "Filed October 11, 1913," and containing a verification signed

(Testimony of Isabelle Garwood.)

by you in which you swear that the facts set forth in the complaint are true—that you have read the complaint and know the contents thereof, and that the same is true of your own knowledge save as to those matters which are therein stated on information and belief, and that as to those matters you believe it to be true. Is that your signature (pointing)? A. That is my signature. Q. You did swear to that complaint, did you? A. I swore to whatever I put my name to. Q. And you did swear in this courtroom several times that it was represented to you before you bought this that there were 300 acres planted to alfalfa? A. No, I have never said in my life that there were 300 acres planted to alfalfa. Q. Did you swear in [182] this court and in this complaint, that it was represented to you that there were 300 acres of alfalfa? A. First they said there was 300 acres altogether—Dyke said; then afterwards he said there were 250 and 50 acres had been washed out. Q. You knew that when you swore to the complaint, when you testified on direct examination? A. I can't remember all of those little things that they told me. Yes, I first tried to get them to reduce the price. I wanted them to reduce the general price, and after that I asked them to take off the personal property. Then I asked them to throw in the hay. Then I asked them if they would divide the commission. Mr. Crane did not say that he would divide their commissions with Dr. Ramos. What did they say was that if Dr. Ramos would become a partner they would give him commissions,

(Testimony of Isabelle Garwood.)

that even if he was in New York he would get them. Yes, they spoke of his ability as a salesman. Q. Thereupon when you found you could not get the other reductions you even sent him to get a share of that commission, did you not? A. No, positively not. Q. Do you know Mr. C. E. Weinrich? A. I understood Mr. Weinrich, heard him say to the effect that I wanted him to get it for less. I did ask the doctor many times to get it for less. Q. How did you understand what Mr. Weinrich was going to say? A. I heard it here in court. Q. You don't know it other than that? A. That is all I know. Q. Did you, in conversation with Dr. Ramos, on or about the 25th of September, 1911, at Sacramento City, in front of a building known as Turner Hall on "K" Street between 9th and 10th Streets, say to Dr. Ramos, you and he walking together, "I have decided to take the place," and did he answer, "But Mr. Dyke won't pay me my share of the money or my share of the commission"? A. No, never in my life. Q. Did you thereupon say, "Make him pay it?" A. I never said such a thing in my life, no, never. I said it this way, "Frank, I want you to make them give me some more money [183] because I can't pay so much, get them to give me half of the commission." I said that a dozen times. Q. They had refused to give you the commission? A. I said, "Give it to me." I thought he could get it for me because he was always talking to them and saying to me, "Keep out of the way, I can talk to them, let me talk to them"; I was trying to get them to give

(Testimony of Isabelle Garwood.)

it to me. Q. They had refused to give it to you?

A. Yes. Q. You knew Mr. Crane had suggested he might get a commission if he helped sell the land?

A. No. Q. Didn't you say in your conversation, "Make him pay, make him pay it"?

A. To make him give it to me. Q. Not using the words "to me" at all?

A. I suppose I did have one conversation and say "make him pay it," but I did not mean to him, I meant to me. Q. You remember the rest of

the conversation, "I have decided to take the place," and his answer, but Dyke would not pay him his share of the commission? A. If I could get it cheaper—

I did take it although I did not get it cheaper,—I did take it, I decided to take it because they told me— Q. —Didn't he answer you, "Dyke would not agree to pay me my commission"?

A. No, positively. Q. Did you say "make him"?

A. No, I never did. Q. If you said anything you said, "Make him pay the commission to me"?

A. If I said anything it was "Make him give me it," because I asked the doctor over and over again to get it off for me.

Dr. Ramos never used any of that money to buy me an engagement ring. I never made that statement,

never. Not to anybody. It is utterly false, and I have denied it many, many times. Yes, in October

Mr. Brown called my attention to the fact that Dr. Ramos had received and had been paid a commis-

sion. Mr. Brown said so. He said that Dr. Ramos had received a commission. That was in October,

1911, and I then sent for the doctor. The doctor told me that he had not received it. He told me he

(Testimony of Isabelle Garwood.)

never received it to his dying day. He told me he never received it. He told me he didn't know they were going to pay him, he never heard of it. He was very indignant when I told him. Q. Don't you know that commission was not [184] to be paid until the sale was consummated? A. I don't know that that commission was ever to be paid, or I would have broken my engagement to Dr. Ramos, and I would never have bought the land, because I would have known they had placed me false, all of them.

Q. But as I understand you Mr. Brown told you that Dr. Ramos did receive the commission? A. Mr.

Brown said so, but Mr. Brown saying so don't make

it so. Q. But he said that Dr. Ramos had received the commission? A. He said the doctor had. Q.

As a matter of fact Dr. Ramos had not received the commission at that time, had he? A. I don't know

a thing, nothing, about it. Had I known it I would not be here to-day, I would have thrown up the whole

thing. Q. When Mr. Brown told you that did you go to the California Colonization Company or any-

body else to ascertain whether or not they had actually paid the commission? A. I did not believe

it, that was the end of it; I did not believe it. I never heard of it again. I asked the doctor over and over

again and he said no he had never had it, they had given him no commission. Q. At that time in Oc-

tober, when you did send for him he had not received the commission? A. I don't know. Q. So you had

a conversation with Dr. Ramos on the 25th of September, 1911, in which you told him to say that you

(Testimony of Isabelle Garwood.)

would not take the place unless his commission were shared with somebody or yourself, you say? A. No, on the 25th of September I went into the office and said, "Have you asked the Scheibers if they will take off that grain?" and they said, "They won't do it." I said, "Won't you throw in the animals, and they said, "When you have paid \$75,000 for 600 acres of land, exactly \$125 an acre, you do not get an animal for an acre." Then they received everything, and then I turned and left with the doctor, and he says, "You ought to be ashamed of yourself, trying to Jew them down that way," and then we walked toward the park and I said, "Do get them to take off the commission, I can't pay so much"; they didn't do it and I went back and bought it because he [185] advised me to. Q. Now, at the time that you paid that \$5,000, I call your attention to the fact that it had not yet been decided that you would not get the personal property and it had not been decided that you were going to pay the full \$75,000? A. No, but I was trying to get them to take it off; if they did not do it, I was going to take it because the doctor had advised me to take it. Q. It was explained to you on the 25th of September, that the Scheiber brothers refused to take less than \$75,000? A. That conversation was later, it must have been on the 26th then. Q. It was on one of those two dates, after you put up your \$5,000? A. Very well. What I told you is true. Q. To the best of your recollection? A. But the facts I remember. Q. The facts you remember? A. Yes. Q. When did Mr. Brown give

(Testimony of Isabelle Garwood.)

you this document marked "Plaintiff's Exhibit 5"?

A. I don't know that Mr. Brown ever gave me any document. What is it? Mr. Brown did not give me this that I know of. I got that paper in the California Colonization Company before I bought the land—I bought the land on those words. Q. This document says "300 acres of land in alfalfa"?

A. I thought it said 600, that isn't it. I couldn't see without my glasses. Q. Have you your glasses?

A. I have. Q. This document says "300 acres in alfalfa"?

A. I don't know anything about this. The only thing I saw was the one which had 600 acres in thoroughly subirrigated land. The one the

California Colonization people gave me was the one that I bought the land from. Q. Is this the document? A. I don't know; I have no doubt that is it.

I don't know that the wording was that exactly, but this reads like it—yes, this must be it. Q. That contains the statement that 300 acres are in alfalfa?

A. Yes. Q. You knew that there were only 200?

A. They told me. Q. You knew [186] that the statement was incorrect, did you not? A. That state-

ment may be incorrect as to the number of alfalfa acres, but it would be correct as regards the alfalfa

and rich land. Q. Did you ask the Scheiber brothers about it when you found there was a misrepresentation with reference to the number of acres in alfalfa?

A. No. They told me this— Q. —Did you ask him about anything else contained in the advertisement?

A. No, because they told me everything was the

(Testimony of Isabelle Garwood.)

richest alfalfa land, all good, clear level land like what I was looking at.

The COURT.—Q. What was it you said that the Scheibers had told you? A. The Scheibers at their place told me that there had been a break in the levee and 50 acres had been washed out, and they said 50 acres of the alfalfa was old and the rest was new, but after I got on there my man said a great deal of it was old, even of the 200 acres.

Mr. MILLER.—Q. Of this 160 acres of land shown in the lower corner of this ranch you planted some 40 acres to alfalfa, did you not? A. I hired horses, because these horses were no good and turned up the land and planted barley and it was a failure. Q. You had it planted in alfalfa? A. After that the man that is on it at present planted it with alfalfa mixed with barley, and it was a failure. Q. He had a splendid crop? A. It was a failure. Q. This year's crop of alfalfa? A. I have been there this year and seen it. Q. How many crops have you cut from it this year, that 40 acres? A. I don't think he has cut but one. I know he turned the cows into it for pasture; he says it is no good. Q. Do you know that he turned the cows in? A. I know he turned the cows in; he said it was no good. I have paid \$1,000 for alfalfa seed. Q. Did you see the cows in the alfalfa field? A. That that he planted first was out [187] and he planted it again. Q. Please answer my question. The 40 odd acres of alfalfa that you had planted in that 160 acres now, this year, how many crops have been harvested from it? A. I have

(Testimony of Isabelle Garwood.)

not been there this year; I was there last August one day. Yes, it was represented to me that Mr. Dike and Mr. Brown were considering forming a corporation to take this land and run it as a dairy farm. Yes, Mr. Brown and Mr. Dike represented to me what they could do with the land by putting on additional cattle and using it as a dairy farm. Yes, Mr. Brown went into figures quite elaborately to show me what could be made out of it if he were given the management of it. They told me that Mr. Brown had made a study of the implements, that Brown was a farmer and had lately been selling implements for Baker & Hamilton; they had made a thorough study of them, and they were good enough for them to take over, that Dike himself was an old farmer and had made a study of the farm, and he had examined all the animals, the same as Brown had, and considered them all first-class; and I said, "I am no judge of stock, but if they are good enough for you, they are good enough for me to bring an income until I can cut up the land," which was to be done during the Fair. It was represented to me that I could cut up 600 acres of the very finest alfalfa land, and that is what the farmers wanted. It was represented to me that the land could be subdivided and sold at an advance during the Fair, at three times the price I had paid for it. Q. And Dr. Ramos was a party to that representation? A. Dr. Ramos said nothing about the money, he said, "I believe you are getting a good bargain and take it." Q. You relied upon what Dr. Ramos said? A. I relied on Dr. Ramos and them

(Testimony of Isabelle Garwood.)

because they told me that and I relied on that instrument. Q. Prior to that time or about that time you had been told that Mr. Dike was not reliable? [188]

A. Well, no, Mr. Crane said that—Dr. Ramos said that Crane was a gentleman but he did not approve of Dike. Q. Where have you resided since the 1st of September, 1911?

A. 1911? Q. Yes. A. I came out here traveling; had I not bought a farm I would have gone home—I was going home and went to Mr.

White to leave the farm in his hands, but when I found out I was cheated I had to remain and I did not get away from here, because I was trying to put the case in law until December, 1912. I did go home once in the meantime and come back. Q. Where did you go?

A. I went to New York. Q. What part of New York?

A. New York City. Q. How long were you there? A. I was only there five days. I

went to negotiate to pay for the animals. Q. What is that? A. I went to negotiate for paying for the animals that I had taken over. Q. You went to negotiate

some of your bonds? A. No, I went to borrow, sell some things to pay for the animals. Q. You went back to get some money in order to pay for the animals?

A. Yes. Q. Where have you lived since that time?

A. Since that time I have lived in New York City; I was there all the winter of 1913, spent the entire winter in New York, until May, the latter part of May, I came out here; my men were quarreling and said I must come out here and settle things. I wanted to go home, but I was going to almost every lawyer in Sacramento and I could not get anyone to

(Testimony of Isabelle Garwood.)

do anything. I came out in May and I stayed until the 4th of November, trying to get Mr. Macomber interested, and then I went back to New York and stayed there until—I arrived back the 17th of August, last August, and I came out because Mr. Macomber told me the case was coming up in November; I wanted to go back home then when I found out it was continued, but he would not let me go.

Q. Have you any relatives in New York City?

A. No, they [189] are all dead; my father and mother kept house there.

Q. Have you a permanent residence in New York City?

A. I lived in the Madison Square Apartment house two winters before I bought the property; the winter before I bought it I lived in the Stratford House.

Q. The winter before you bought the property you lived in the Stratford House. Where did you live the winter after?

A. In Sacramento. I was trying to get it in law.

Q. The winter of 1912?

A. I was in Sacramento.

Q. The winter of 1912 and Spring of 1913, you were not in Sacramento, were you?

A. I was in Sacramento all the time. I was trying to get this case in the lawyer's hands.

Q. Weren't you in New York nearly the first half of 1913, up to May, 1913?

A. I was in New York in 1913. You were speaking

of 1912?

Q. The beginning of 1913.

A. I left Sacramento in December, 1912.

Q. And went to New York?

A. Yes.

Q. Where did you stay in New York?

A. I stayed at the hotel.

Q. You have no property of any kind there, have you?

A. I have property in Jersey.

Q. What kind of property?

(Testimony of Isabelle Garwood.)

A. A lot. Q. In Jersey City? A. Yes. Q. You never resided on it? A. I was born in Jersey City. Q. You never resided on that lot? A. Oh, no. I have lived in hotels ever since my mother died, apartment hotels. Q. When you came out here you lived in an apartment hotel? A. Yes. Q. You lived in the St. Francis for many months? A. I was coming back between Sacramento and the St. Francis, I had to stay here on account of the law. Q. Do you still own that lot in Jersey? A. Yes. Q. The only other property you own is this property in Sutter County? A. No, I own property in Kansas that was left to me. Q. Now, Miss Garwood, about three months after you got this place, did Mr. Charles Silva offer to take it off your hands at the price you paid for it? [190]

Mr. MACOMBER.—We object to that as immaterial, irrelevant and incompetent and nothing to do with the case whatever; it does not make any difference what offer was made to her.

The COURT.—When was that?

Mr. MILLER.—About three months after the purchase of the property.

The COURT.—I will overrule the objection.

A. No, sir, Silver never offered to take that place off my hands. Nobody ever offered to take it off my hands.

Mr. MILLER.—Didn't he offer to give you the same price you paid for it? A. He did not. Mr. Silva took me out there in his car and told me I have a very good man in Mr. Scammell, to let him stay there,

(Testimony of Isabelle Garwood.)

but if I wished he would look after the place.

Q. Didn't he offer to buy it from you? A. Didn't I tell you he did not; he never mentioned it to me.

Q. How many suits have you brought in relation to this land? A. I brought one previous to this; it never matured.

Q. In Sutter County? A. In Sutter County.

Q. Did you commence actions in the Superior Court of this city and county? A. Never but this one court; this is the only time.

Mr. MILLER.—I guess counsel will admit as to that.

Mr. MACOMBER.—I guess you have forgotten about that; there were two suits filed in the Superior Court here. That is right. A. I don't know anything about that.

Mr. MILLER.—Q. They all involved the same matter, did they not, the same property? A. The same property, certainly.

#### Redirect Examination.

I was born in Jersey City. I lived in New York for a great many years, and kept house there. The last time I went East [191] was on the 4th of November, 1913. I returned the 17th of August, 1914. I returned because Mr. Macomber told me my case was coming up in November and my sister was coming from New York to Chicago and asked me to come with her. I asked Mr. White how much I owed him, and he said the bill will come along in good time. I took my contract with Mr. Brown to him, because he was my lawyer. Mr. White never sent me a bill. When this case is cleared up, I expect to go home to

(Testimony of Isabelle Garwood.)

New York. The Doctor gave me an engagement ring in May, 1911; in May or April, 1911, in New York City. He bought the ring of a man named Court, who keeps a small jewelry store in Jersey City. His business is on Monticello Avenue, not far from Bergen's place. The stones were brought to New York for selection. I selected the stone myself. He never gave me but one; he never bought me any other.

**Testimony of W. H. Ewen, for Plaintiff.**

W. H. EWEN, called for the plaintiff, testified as follows: My name is Wm. Henry Ewen. I live at 3515 Sacramento Street, San Francisco. I was two years on the Nicolaus Allgier place, about 11½ miles south of Nicolaus in Sutter County, California. I went upon the place in 1890 and was on the place two years. I saw this land previous to the time I actually farmed it. I was often down there by the place, and on the place. I lived in Nicolaus for about 10 years. I was running a stage line carrying passengers and mail for about 9 years, and I had occasion to take passengers down by this land. During the time I was running the State line I had a good deal of business with Mr. J. C. Regan, who then owned the ranch, and my business with him took me down to see the man who was taking care of the place, and I went down there at all times, both summer and winter—when the water was over the place, and at other times when there would be haying and so on. The overflow used to come from the Sacramento up to [192] that place, that was the end of the overflow.

(Testimony of W. H. Ewen.)

It came up between the Swall place, Johnnie Swall's, and came through the channel there and covered the back of the Regan ranch. There was about 200 acres of the land in the back of the ranch which was overflow land; it would run into the back field, and then across the second quarter section of what is now termed the Scheiber ranch. It used to be then the Redfield ranch. The water came up from the tules. The tules ran along the river, and when the water was high in the river, it used to back up over the tules and go right up to the Nicolaus ranch, and then overflow the land. I have seen that land overflowed for two or three months at a time—completely submerged, not over all the ranch, but all over the back field,—about 200 acres of it. That portion of the ranch up toward the county road that runs from Nicolaus, is the highest point of elevation; that is to say, the portion of the land nearer to the levee has a greater elevation than the rear portion of the ranch. I am now speaking of the Nicolaus Allgier ranch.

Mr. MACOMBER.—Q. Mr. Ewen, are you familiar with soils and with farming land in general?

A. Yes. I have had a good deal of experience in farming, not only in this country, but in Canada. I was ten years farming in Canada exclusively, and I was two years farming on the Chandler ranch before

I went into the stage business. Q. Do you understand what is meant by the expression “subirrigation”? A. Well, no, I am not familiar with the word without you can explain it to me in some way. By subirrigation, is that from seepage, or is it from the

(Testimony of W. H. Ewen.)

water that is let into a place to irrigate? Q. What I mean by subirrigation is seepage. A. There is land, a good deal of it, on that ranch, that is kept green all the year around by the seepage from the river. Q. There is? A. Yes. [193] Q. That land, you say, grows alfalfa all the year around from seepage? A. Yes, it would grow all of the year around from the seepage from the river. Q. About how much land is of that character on that ranch?

Mr. MILLER.—We object to this as not referring to the present, but referring to a time 25 years ago.

Mr. MACOMBER.—That is all right, 25 years ago; that is all we expect, 25 years ago. A. There was about 250 acres, as you call subirrigation, that would be good for subirrigation on the ranch. Q. What portion of the place was that that was subirrigated, that is, water by seepage? A. There was a field called the 100-acre field on the county road coming from Nicolaus in front of the levee; that was mostly in alfalfa there all the time; then there was a field back of that, another quarter of a section that went very near down to where the old house was, what they called the Hallett house, and then there was a hollow that ran out from the back field—part of that quarter section would overflow from the tule. Q. That is all right about that. We do not care anything about that. A. (Continuing:) Then there was 40 acres of oak grove which would make good alfalfa land, that laid all right. And there must have been, about, as near as I can remember, about 250 acres of land that would grow alfalfa. Q. What

Testimony of W. H. Ewen.)

about the extreme rear end of the land—do you recognize this map as being a likeness of the boundaries, at least of the outlines of that ranch? A. This is the Nicolaus Allgier ranch. Yes, I recognize the map you show me, that looks to be about the shape of the ranch; the back field is down at the bottom here. Yes, I know the land which will produce alfalfa, and the land which will not produce alfalfa. The land at the rear isn't any good for alfalfa, unless they can get in water and irrigate—not in the back field, it dries up. It is a hard clay bottom, and it is not a loamy soil; it is a very stiff clay in [194] that back field, because I have had to plow it up a couple of times; in fact, I plowed it three times, and it is a very stiff bottom land. When the waters go down, then it dries up and bakes, so that if there was any crop in there, of course it would mature an annual crop, but it would not be good for alfalfa. It would dry out, unless they had water flowing over it to irrigate it. It is just the same as any high land that you have to irrigate, you can raise alfalfa only after the Spring. You might get one crop or two off of it, but after that it would dry out. That is the way it is with the back field, and a part of the other quarter section where it runs down through a hollow and over to the Redfield place. I would say that there are about 200 acres of land, such as I have just described, of low overflow land on that ranch. Yes, I had a crop drowned out there, that was in 1891; that was barley. I put it in in March, and then the high water came about a month later. "It had all

(Testimony of W. H. Ewen.)

come up and was green all over when the water came up and drowned that out, and then I had to wait until the water went down, and then I just harrowed, and put it in again, and raised a crop for the second time. I put it in the first year I was on the ranch. The next year I plowed the ground in the fall and got it all ready for the next spring, and I waited until late, until I thought all the water was gone down, and then I put it in, and it grew up and looked apparently like it was going to be a fine crop, and then the snow raised the river—by the snow coming off the mountain it raised the river in June, after the crop was all headed out, and it backed up the water on the tule land, on the tule where the overflow, as they call it, came up, and I put a dam and held it back for two weeks, and the dam broke on me, and it flooded the whole thing, so I lost that crop; it went all over the ranch at that time. Q. In what month did you say that was that occurred? A. That was in June. Q. Of what year? A. That was in 1892.

Cross-examination.

I was in Nicolaus about three years ago. I was on the Nicolaus Allgier ranch at that time. I went through it, down [195] through the land, and came through that way. I went to see some friends out on the river. Yes, I noticed alfalfa growing along where I went through the lane. It looked green to me as I went along; I could not tell you what kind of a crop it was, I did not notice it. I was there in April, that is the only time I had been in Nicolaus

Testimony of W. H. Ewen.)

since I left the ranch. I left it there in 1893, that is the only time, I have not been there since. I believe there has been something done to the levees along the Bear and Feather Rivers since I was there, but I cannot say how they have been fixed. Yes, that map represents the shape of the Allgier ranch as it existed when I was there. When I was there there was a bend in the levee running up toward the house where the big barn was, and the house I lived in at first, right in the corner by the levee. I believe the river isn't in the same place now, because I have been told that it has been straightened along there. I could not tell by looking at the map now, unless the changes were explained to me. In 1891 and '92 the Feather River did not run in a straight course, as it is now shown on the map, it came down from the town of Nicolaus toward the Nicolaus ranch, and then it made a bend at that point away out. It run west of there as near as I can think of it. It made a bend away around at that point called the Nelson Bend; it made a regular circle right around there where the Nicolaus ranch and Claus Peters' old place was. Along the river at that point there was just swamp grass. On all of those farms along the river in the vicinity of the Nicolaus Allgier place some places had alfalfa, and some places had just wild grass for pasture. There was some grain. There was not much buckwheat on this side when I was here, with the exception of one time I put it in myself. It takes a sort of river land to raise good buckwheat, there has to be more moisture to grow it. I

(Testimony of W. H. Ewen.)

put a crop of buckwheat on the land where the barley was drowned [196] out right after the flood, and got a fair crop. I had a fair crop, yes. On this back land, the 200 acres at the rear of the Nicolaus Allgier place, I never dug any wells. There were wells already there; there was a well in the back field. I could not say how far it was to water there; I never knew the depth of the well, because I never had any occasion to take up the valves; it was always in working order while I was there, it was a deep well.

#### Redirect Examination.

There was a break in the levee while I was on the ranch. There was a break in the levee on New Year's Eve of 1892. I noticed how the levee had been repaired when I was there the last time. The levee broke right by the house where the big barn was, and the house that Regan used to live in when I was working the place. I remember the character of the land that lay on the outside of the levee; it was sediment that flows up there from the river inside the levee. When the river went down sometimes they turned hogs in there, they had a wire fence around the course of the river so as to keep the hogs intact; they used to turn their hogs in that and sometimes the cows. In the high water, it was almost all the time covered over. I could not say exactly how many acres there was outside the levee, it was quite a stretch down to where the river was running. To my knowledge, fronting the Regan ranch, it looked to be about 40 or 50 acres right along the river.

(Testimony of H. W. Furlong.)

Recross-examination.

You could see the timber riding along the road.

**Testimony of H. W. Furlong, for Plaintiff.**

H. W. FURLONG, called for the plaintiff, testified as follows:

My name is H. W. Furlong. I reside in Berkeley. I am an agricultural engineer by profession. My business is conducted [197] as a corporation, the name of which is Bigler, Paul & Furlong, incorporated under the laws of the state of California. Our principal place of business is at Sacramento. Our laboratories are there, across the river in Yolo County. Our business is to report upon agricultural lands and recommend treatment of lands and choice of crops. I have had occasion to examine the soils of lands. We make analytical tests of soil, mechanical tests, chemical tests; we correlate all the factors which go toward making agricultural lands economically desirable. We determine the economical desirability of lands by correlating the factors of climate with mechanical characteristics of the soil and with the climatic factors and other economic factors. We consider and determine the chemical constituency of soils. I have my own idea as to what is meant by subirrigation; it is a much abused term. It is a general term that is frequently used with a great deal of license. I have been in Sutter County along the Feather River from Nicolaus down, and I have been on the Nicolaus Allgier place, which is now known as the Garwood place. I am familiar

(Testimony of H. W. Furlong.)

with that particular land. I am familiar with the soil in that neighborhood. I understand the geological features of that vicinity, and of the adjacent territory. I understand how that land happened to be there in that particular condition. I understand the geological explanation of it. I am familiar with what land is good for alfalfa, and what is not. There are many conditions which must be correlated with the land. I have had experience in examining alfalfa land, and I have reported on alfalfa land. I have had experience in the purchasing of alfalfa land. I am familiar with the values of alfalfa land more or less throughout this State. I have examined the land on this particular ranch now known as the Garwood place, about a mile and a half below the town of Nicolaus. I don't remember the exact date, but I think it was about 4 weeks ago. I am familiar [198] with the 200 acres of land at the southeasterly end of the Garwood place—that is the 160 acres of the quarter section, and the land immediately adjacent on the north; that land is not good alfalfa land. I should like to qualify my statement in a slight measure. The types of soil into which this ranch is divided do not run across the ranch, but they run more toward the north and south, in that direction; therefore, a small fraction of the southerly 160 acres might be excluded from my classification, and a larger fraction of the adjoining parcel on the east be included in it. My statement was general covering that end of the ranch. The soil of the extreme Southeasterly corner of the

(Testimony of H. W. Furlong.)

ranch is a clay sub-soil overlain by a clay loam. The top one or two inches is lighter in character, and getting increasingly dense as you increase the depth. That soil is not subirrigated according to my understanding of the term "subirrigation." The term "subirrigation" to me means any piece of ground that is provided with a sufficient amount of moving water from subterranean sources, either running parallel to the plane of the surface, or coming from below. Yes, I mean to raise crops on—to properly provide growing crops with moisture. You see why I discriminate that way is the fact that a piece of ground that is water-logged, where water may flow into a cut or depression and gradually percolate, but is stagnant, you would hardly call subirrigated. Crops must have a movement of water. In the rear portion of that land, I should say, there is not such a movement of water as I have spoken of. I will qualify that. In all soils there is some movement of water, but by movement of water I mean movement in an appreciable measure, and sufficient for the best interest of deep rooted crops. I mean a practical flow of water. The heavier clay subsoil which determines the amount of subirrigation lies in a general direction parallel with the direction of the river, and from a point approximately in here, it [199] comes off in this direction, excluding a portion, I should say, of this field. I would not want to say definitely it was five or ten acres, but somewhere between five and 15 acres, and including here anywhere from 40 to 60 acres approximately. I did

(Testimony of H. W. Furlong.)

not measure the ground as a surveyor or follow the lines that were shown to me to be quarter section lines and estimate according to that. As to whether or not it would be commercially practical to grow alfalfa on land subject to overflow would depend entirely upon circumstances governing the overflow. By that I mean the period of time that the water was over the land. The depth of the water over the land, and the character of the land with regard to permitting drainage after the subsidance of the surface water.

Q. In reference to the growth of alfalfa on land which is liable to overflow, is it commercially practicable or is it not, to grow alfalfa on land which is subject to overflow; what can you say to that? A. It would depend entirely upon circumstances governing the overflow? Q. What do you mean by that? A. The period of time that the water was over the land, the depth of the water over the land, the character of the land with regard to permitting drainage after the subsidance of the surface water. Q. If you have alfalfa growing on land and water from any source comes and covers that alfalfa, submerges the alfalfa, keeps the land saturated, how long a time does it take to be fatal to the alfalfa?

Mr. MILLER.—I object to the question as immaterial, irrelevant and incompetent.

Mr. MACOMBER.—Q. Do you know enough about alfalfa to state that?

A. I believe that I do know. Q. Will you state?

(Testimony of H. W. Furlong.)

Mr. MILLER.—Objected to as incompetent.

[200]

The COURT.—The objection is overruled.

Mr. MILLER.—Exception.

A. On land of this character, where water would cover the land and partially cover or entirely cover the plant, and where it would be subjected to being caught in depressions and held there by the dense character of the land, combined with the small amount of oxygen present in the dense land, I should say that two or three days would be prejudicial to the plant, and probably 7 to 12 days would be fatal, practically.

The COURT.—Q. Depending upon the age of the plant? A. Depending upon the character of the weather, whether it is very hot sunshine afterwards or cloudy, yes, and whether the alfalfa were rapidly growing; but I should say in any event that 8 or 10 days would be very prejudicial. There is oxygen in the ground there, but not a great deal available. The land is acid in character; it reacts to test for acid. That character of land is detrimental to alfalfa, and is detrimental to most plant life. The water seeps into the soil to a certain extent away from the levee along the Feather River at this point. Q. Now, why is it that the water seeps through there and when it gets out there is enough to irrigate the crops in here, the alfalfa, and does not likewise as you go further away? A. I can explain that better on the board and use fewer words. I will not vouch for the proportions of this. The theory is

(Testimony of H. W. Furlong.)

all that I intend to show. This being the bed of the Feather River; the Feather River, in the course of the last several hundred years has moved back and forth, as rivers do; of course, it is building itself up; and over this portion it has eroded the older surface; the older surface through all this section probably having been a lake bed, a lake bed in which a great deal of silt has ben deposited and had become very compact, lying there for no one knows how long, and being of an undertermined depth, the Feather River, in washing [201] back and forth, has deposited through this area sands and gravels which are large and therefore have no more open spaces owing to the fact that their deposition took place first in the action of that erosion; as the water loses its strength, it deposits increasingly dense material and therefor more dense the river has got at various times across that old lake bed, cutting into it, that clay subsoil, and has gradually cut such an area of space as this. Now, through all of that area, the water can come; immediately it strikes this more dense subsoil, it is blocked; I do not mean that that subsoil will not take up a small quantity of water, it probably will, but not in sufficient quantity to recognize it as sub-irrigation. Now, on this property, this line comes up, at about the point that I drew that line which I drew on the map, and at this point you get very little water action, and as you go further toward the river naturally you get more; the capillary attraction, of course, comes throughout all of this soil where the water underlies it; it is all at a depth

(Testimony of H. W. Furlong.)

sufficiently shallow to permit capillary attraction to serve it. I took pictures of the land, I took them upon the occasion of my visit to the ranch. I took some of these pictures as I sat in an automobile on the road which runs westward, approximately from the ranch-house there on the land at a point about midway between the ranch-house and the westerly boundary of the property. The probable southerly extent of the action of subirrigation is outlined there by the growth of alfalfa, which is to be seen in the mid-distance in the picture. That irregularity of outline of the edge of the growth of alfalfa would be dependent on those conditions, because this soil does not rapidly and immediately merge from one type into another at contact, but it fluctuates within an area of probably one-fourth of a mile back and forth across and along this line of demarcation. It is a zone [202] rather than a line, and that would indicate very clearly the existence of subirrigation and its limits in that direction. I took this picture when I was somewhere in the vicinity of that cross there, where the ranch house is, if anything more southerly. They were both taken at that point. One of the pictures was taken looking in a north-westerly direction, and the other in an east of north direction. I examined the land northwesterly of the old levee, and made an investigation of that land. That land merges from sand into a light sandy loam. That land is not alfalfa land—not because of lack of fertility, but because of its position. I have had experience in purchasing alfalfa lands, I have bought

(Testimony of H. W. Furlong.)

alfalfa land. Q. Are you familiar with the values of alfalfa land? A. Fairly so.

The COURT.—Q. In that locality? A. In that general locality, yes.

Mr. MACOMBER.—Q. Would you state your opinion as to the value of that land, outside the old levee, the land between the two there?

Mr. MILLER.—We object to that as immaterial, irrelevant and incompetent; the witness is not shown to know the value of the land, know what it would sell for in the open market; what he has said as to being familiar with the general locality is not sufficient to qualify him in the matter,—he is not a land owner or expert in the business.

The COURT.—It is not shown how long since he purchased any land and when he obtained his knowledge.

Mr. MACOMBER.—Q. Mr. Furlong, do you know what lands have sold for along here, along the Feather River, within the last four years, any of the land along the river? A. I do. [203]

Q. Now, what have these lands sold for there?

Mr. MILLER.—I object to that as incompetent.

The COURT.—The objection is overruled. What other lands sell for in the immediate vicinity and about the time in question is always admissible to fix the market value.

Mr. MILLER.—I understand the law in this state to be that a witness may state that he knows land was sold here and there, what pieces were sold, without giving any price for which they were sold, and after

(Testimony of H. W. Furlong.)

he has qualified himself as an expert at that particular time when the value of the land in question is to be determined, he can then testify that he knew the market value and what it was of this particular land, not of any other land, or what it sold for; I think that is the rule in the state court.

The COURT.—I think it is correct, too. The objection which counsel pointed out more specifically as his objection, I will sustain.

Mr. MACOMBER.—Q. Mr. Furlong, will you state, basing your statement upon your knowledge of the sales of real estate in that vicinity, what that land was worth out there, outside of the old levee?

Mr. MILLER.—Objected to on the same grounds.

The COURT.—In 1911?

Mr. MACOMBER.—In 1911.

The COURT.—If he knows. A. Yes.

The COURT.—The objection is overruled.

Mr. MILLER.—May we ask a question there?

The COURT.—Yes.

Mr. MILLER.—Q. Do you know of any land like that between two levees that was sold in 1911 in that immediate vicinity? A. I know of land that was sold prior to 1911. Q. How long prior? A. The land that the Natomas purchased. Q. What land was it? A. I would have to refresh my memory to give you the [204] exact location of that land. Q. Do you mean that the Natomas Consolidated reclaimed certain lands in the American River basin and sold that land? A. They purchased land in the American River, I know the price for which they

(Testimony of H. W. Furlong.)

purchased the land. Q. Lands which were subject to an overflow from the American and Sacramento Rivers, continuous overflow? A. Immediately to the south of this portion. Q. And required an expenditure of large sums of money to reclaim it? A. No more than this piece. Q. How far from this land? A. I should say possibly it is half a mile, and the other case that the Natomas sold about 1911 or 1912, about two miles. Q. Am I right in this: Those purchases were made after the Natomas Consolidated had organized two reclamation districts known as 1000 and 1001, and had notified the people that an assessment of \$75 or \$80 an acre would be levied upon the land? A. I think it was about the time of this sale, about in 1911. Q. And that one-third of that would be called in immediately, and that those who did not sell to them would be compelled to put up that money in cash at once? A. At that time the Natomas plans were not completed; it was not known what the reclamation would be; I know varying estimates were made. Q. Then it was sometime prior to 1911? A. They did not know yet what the reclamation would be. Q. Am I right in saying that they controlled both of these districts and had the management of the districts, and the land owners of the district were so advised before they made the purchase? A. I cannot tell you as to that positively. Q. Do you know that the owners were forced to sell because they were unable to pay this assessment which the Natomas Consolidated intended to levy upon the lands? A. You mean forced to? Q.

(Testimony of H. W. Furlong.)

Forced to sell because they could not stand the reclamation assessment? A. I don't know that they [205] were forced to do that; that would be an inference on my part, because it had not been done at the time; they would have been operating from inference, and I would of necessity also have to argue from inference; I don't know that. Q. Don't you know as a matter of fact that \$26 an acre was called in prior to November 1911, on the lands that you refer to, and on the lands in that 1001 district? A. I don't know the amounts that were called in. I know that was increased from time to time, as has been the case, I think, with every reclamation district in the State of California; we usually under-estimate rather than over-estimate. Q. Are you engaged in the real estate business? A. No. I own farm property—I am interested in farm property. Q. Where? A. About 6 miles west of this piece, on the west side of the Sacramento River, in Elkhorn reclamation district; I own an interest in 200 acres in West Sacramento. Q. Did you buy it of Cave & Clark? Where, in the Elkhorn district, is that? A. No, we bought it from Mr. Ashley, county surveyor of Yolo. Q. Is that land some of the alkali belt that goes through there, or not? A. I should say that all of these lands are subject to alkali, depending upon the amount. Q. Is it a corporation that owns the land that you say you are interested in? A. No, Mr. Harbinson and myself purchased it from Mr. Ashley. Q. When did you purchase it? A. I think in 1911

(Testimony of H. W. Furlong.)

or the early part of 1912. Q. Is it situated similar to this land? A. It is in a reclamation land listric; it is similar to this, but the interior drainage is not complete. Q. You don't know whether outside levees were put up on this land in 1911 or not, do you? A. I am given to understand, my best recollection is I was up [206] there with Mr. Oliver watching the progress of that outside levee, and according to my recollection it was somewhere about 1911, the latter part of 1911 or 1912— even later they worked on it last year; I was up there at that time. Q. Do you know as a fact that the levees were not constructed in 1911? A. I think they were not, the outside levees—the dredge “Hercules” was up there and was working; I don't know whether on that unit or not.

The COURT.—The objection will be overruled.

Mr. MILLER.—Q. The land that you own is across the Sacramento River? A. Yes, on the Elkhorn side.

Mr. MILLER.—We except to the ruling.

The COURT.—We will now adjourn until tomorrow.

Mr. MACOMBER.—If your Honor please, I have a witness here from Sacramento who is very anxious to get away, and I anticipate the cross-examination of Mr. Furlong will take some considerable time anyway, and I would like to call him.

The COURT.—I cannot do that. I must hear this testimony in its regular order; it takes too much time to try a case in that manner. I would like to

(Testimony of H. W. Furlong.)

accommodate you, but the time has arrived when I must expedite this case. I want to say to you gentlemen I am absolutely compelled to be in Los Angeles on Thursday morning; I had hoped to leave here this morning; to-morrow evening I am compelled to go, and if you take up very much more of the time in introducing cumulative testimony and do not give the defendants time to introduce their testimony, the case will have to be withdrawn and started over again, because it is utterly impossible for me to be here any longer than that time; I am compelled to be in Los Angeles on Thursday morning. Recall the witness upon the stand when we adjourned.

H. W. FURLONG, direct examination resumed.

[207]

Mr. MACOMBER.—Read the last question to the witness, Mr. Reporter.

(The following question repeated by the reporter:)

“Q. Mr. Furlong, will you state, basing your statements upon your knowledge of the sales of real estate in that vicinity, what was the land worth out there, outside of the old levee?”

If I remember right, counsel objected to that question and the Court overruled it. I ask you, Mr. Furlong, for the value in 1911 of this land outside of the *of the* old levee? A. For agricultural purposes, I should say the land was valueless at that time. Q. That is the land lying to the northwest? A. To the north of the old levee, northerly of the old levee.

To the best of my recollection, it was during the first week of July, 1915, that I took those photo-

(Testimony of H. W. Furlong.)

graphs at that point. I took the picture on the levee at the northwest corner of the ranch looking in a northwesterly direction. This is the picture. (Photograph marked "Plaintiff's Exhibit 7.") These other pictures I took at intervals along the crest of the old levee, looking northwesterly. I should like to add to this one photograph that shows a small portion of cleared land, a very small piece, in order to show its character. With the exception of this small portion of land, comparatively a few acres in extent, all of the land between the two levees is of that general character, uneven, very heavily timbered, and barrow pits made at the time the earth was used to make the old levee. It would not have been commercially practicable for the owner of that land to have reclaimed it, or render it fit for agricultural purposes. It would have cost many thousands of dollars for a levee capable of protecting that piece of ground. The levee that is now there almost gave away last year. After a levee was completed, the cost of clearing the ground would amount to as much as you could purchase it for already cleared and probably protected. Land of that character, properly cleared [208] and cultivated, depending upon its location with regard to transportation, would run from \$75 to \$150 per acre, in specially favored locations. Where other factors in land values occurred, it might run up to \$200 an acre; but land similarly situated as that, I should say \$100 to \$125 an acre. By that I mean for the very best land

(Testimony of H. W. Furlong.)

in that situation, in that neighborhood, at that time. I do not know anything about the elevation there, except from the topographical map, the Government map, and my knowledge of such work—I have handled a great deal of such work; it is very evident to anyone as a practical matter to know whether there is a hole full of water, and there is a hummock inside. The land lying immediately along the new levee is higher, because of the excess material put in there, more easily cultivated than the other land which is lower and submerged in a great part at the present time. I am referring now to the land between the two levees. Referring to the land at the southeasterly end of the ranch, I would say that the market value of that land in 1911 would not exceed \$60 an acre. I would place that value on 220 or 230 acres in there. I have worked as a practical farmer. I have had charge of the work at various times of 1500 or 2000 acres.

#### Cross-examination.

The land outside of the old levee is submerged as agricultural land, yes, there are holes there in which the water fully submerged the ground. Yes, there is water there at points other than in the barrow pits where the water is within a few inches of the surface. Not in every case does it cover the surface, but that is not necessary really to prevent its being available for agricultural. I do not know the readings of the water in the river, [209] that varies from day to day. If the land were 12 or 14

(Testimony of H. W. Furlong.)

feet higher, higher by actual elevation than the river, and the drainage were good, there would be no water in the barrow pits, if all the conditions were good; it would drain. That would depend upon the character of the soil at the barrow pit. You could not make borings of that soil in the barrow pits, it was full of water. It could have been done, but not practically. I did not see water covering the surface, between the two levees, other than the barrow pits, but I made a boring there and found this very wet condition of the soil. I speak of it being submerged agriculturally—we talk of land being submerged when the water plane is so close to the surface you cannot grow crops on it. I have explained that a portion of the land is higher and cleared, this higher portion or hummocks, but most of them are covered with a dense growth. I am trying to speak always from an agricultural standpoint. Q. If the water in the river at the present time is 12 or 14 feet lower than the lowest elevation of that land, what is your explanation of the fact of its being submerged as you understand it? A. The hydraulic gradient in different soils is purely a matter—you can tell exactly by certain tests the plane of the hydraulic gradient; in other words, some soils, the water table will rise one foot in a hundred, in others one foot in fifty, in others the water table will rise one foot in two hundred, as you increase the distance away from your water supply. This water under this has its effect

(Testimony of H. W. Furlong.)

upon that, but these factors are very easily determined—the capillary attraction of water brings a great deal up. Q. Then I understand you do not mean to convey the idea that that land was covered with water when you were there? A. I have explained that. Q. Please answer the question: You did not intend to convey that idea, that the land was covered with water, did you? A. Covered above the surface and looking like a lake, you mean? No, I did not mean to convey that idea. [210] Q. Did you make any borings between the two levees? A. Yes. Q. How many? A. I think three. Q. At what points? A. One in about here, just at the turn, and one over in here, and the other up about in the trees, about here. Q. You did not make any borings in the northeast portion of the place? A. Over by the river, no, I did not. As a matter of fact, I would say that my borings were not made for the purpose of testing for the water contents, but the character of the soil. Q. How deep did you bore? A. About five feet. Q. Did you find water in that distance in any of your borings? A. We found very wet ground; practically—Q. (Intg.) I asked you the question, did you find water? A. Yes, there must have been water there for the ground to have been very wet; of course we did. Q. Did water stand in the borings? A. I did not wait to see that; I presume it would have; I should assume that it would have later. I was not looking for water. Q. You are acquainted with conditions generally throughout the Sacramento

(Testimony of H. W. Furlong.)

Valley, with reference to subirrigation, are you not?

A. In some localities, and in others I am not. Q.

What localities? A. I should say along the Sacramento River and the Feather River and the

Yuba River, and along the American. Q. Have

you made any soil tests in Butte County? A. No,

not in Butte County. Q. Did you ever make any

in Colusa County? A. Yes. Q. At that point?

A. I don't remember the name of the ranch, it is a ranch that was later purchased by the president

of the California Creamery—I made a report on

2200 acres. Q. Yuba County? A. No, it is on the

west side of the river. Q. You never have made

any there? A. Where? A. In Yuba County?

A. No, I have no such borings. Q. Have you ever

made any of Sutter County than the Scheiber

ranch? A. Yes. Q. Where? A. District 70, for

the Alameda Sugar Co. Q. How far did you have

to go to [211] water? A. Various distances.

Q. Do you know whether or not the substrata of water is generally about the same throughout the

level portion of the Sacramento Valley, from Chico to Sacramento? A. The water table, the water plane

varies with the type of ground in which it is found.

Q. On the easterly side of the Scheiber ranch, do you know whether it is any farther to water than

it is on the westerly side? A. It is closer to water

on the easterly side than on the westerly side, I

think, at the present time. Q. Is that not always

the case, speaking of the present time? A. I would

hesitate to say that. The water table at the present

(Testimony of H. W. Furlong.)

time on the easterly side is about ten feet, I am approximating that depth, but it cannot get through, it is of no value, there is a dry area between it and the surface; it might as well be 100 feet for practical purposes. Q. How many places did you make borings on the easterly side of the old levee? A. I think four or five. Q. At what points on the ranch? A. At about the southwest corner, the southeast, and then two thirds—well, at the other corner, at the northeast corner of the south 160 acres. Q. Did you make any borings on any of the adjoining ranches? A. No. Yes, it is true soil will change materially in short distances in the Sacramento Valley—within 20 feet. I have frequently seen good alfalfa land on one side of the river and absolutely poor land on the opposite bank. This land itself shows that characteristic. Bedrock, as true bedrock, does not exist in the Sacramento Valley. Bedrock and hard-pan are very different things entirely. The bedrock is at a very great depth, and possibly at points 2,000 or 3,000 feet in depth. The hard-pan exists at any place where there is hard-pan, from 20 feet below the surface to 4 feet above the general surface of the soil. Hard-pan exists, where there is hard-pan, and the average throughout [212] the Valley would be any point between 16 feet below the surface and 3 or 4 feet above the general surface of the soil; that is, where a long layer of hard-pan has been eroded, the soil has been eroded away from it. I said that the hard-pan, exists in many cases clear to the surface

(Testimony of H. W. Furlong.)

of the soil, and above the general surface. That is not the condition throughout the Valley. The hard-pan is more typical of the land which lies east of the Sacramento River, to an elevation perhaps 800 feet above sea level, going easterly; then you get out of the real hard-pan. Yes, I have made borings in the land of what is termed the Sutter Basin. I do not recall the precise point, but some of them are quite low in the basin. I was looking for the different types of soil as we traveled across the country. We were in an automobile, and we would get out in the road and make borings. Yes, in the lower soil where the water had drained, we found acid in these soils. We did not find it in all places, not where cultivation had taken place. Yes, there has been cultivation in the Sutter Basin, and some of the land put into beans. I don't remember whether I made any borings in the Sutter Basin south of the Southern Pacific Railroad trestle, although I have been over that ground, over the whole district. I don't recall just where the borings were made; I know that I traveled over it and made several borings in the Sutter Basin for the Alameda Sugar Company. When I spoke of an ancient lake-bed I meant a chain of lakes, probably 4 or 5; the American basin is probably one, the Sutter Basin another, and Yuba and Colusa basin another. All separate and probably connected with sloughs. Geologically, that is thought to be the case; there is every indication, both from borings and contour lines—it is a depression. I

(Testimony of H. W. Furlong.)

did not find any gravel myself on the Scheiber [213] Ranch; I would not be surprised to find lenses of gravel there; it is typical of that country. Yes, it is the custom, in boring wells to go down to the gravel strata. As to what depth they have to go on the Scheiber place to find that condition, I know only from what they told me with regard to the domestic well there. That line observed in the picture is the line of demarcation between the alfalfa and the indigenous weeds. The alfalfa stops; the entire ground where the picture was taken and showing the line of demarcation is not alfalfa. I was on the land about the first week of July; I think it was somewhere about the 7th or 8th. Yes, I noticed some alfalfa in the northeast quarter of section 24 at the time I was there. There was some alfalfa attempting to grow there. I have been over that section of the country a great many times. It is very populous. Yes, very many old residents live there. Many of the farms on the higher ground have been farmed a long while. No, I have not bought or sold any land in that locality, unless, as I say, just across the river, I have a short distance from there. No, I would not say Mr. Hewitt, that it is hardly possible to find any two acres alike right along side of each other throughout the Valley. In different sections the conditions vary. You can find very large areas of land practically all uniform; and then in other places, particularly along the zone of change between types, you find a great variation. I have never been engaged

(Testimony of H. W. Furlong.)

in real estate as a business, except that my work has been the development of land; I have never had a real estate office. I have never sold land on commissions. I will qualify that statement that I have in one or two cases helped in handling land, but never as a real estate agent. I attempted to be at one time, but I failed.

Redirect Examination.

The alfalfa that I saw on the quarter section is a very poor stand. [214]

The COURT.—Is Mr. Fox in court?

Mr. MACOMBER.—He is not here; he will be here at eleven o'clock. In the meantime we can take up the time with the depositions.

The COURT.—Very well. You need not read them to me, because I have already read them. I read the first deposition; I have not read the supplementary depositions, but I can do that. You need not take up the time of the court here in reading that, unless there is some objections which counsel desire to urge.

Mr. MILLER.—We have the general objection that we made to all of this line of testimony, that neither Mr. Dike nor any of the parties except the defendant was authorized to make any representations of any kind.

The COURT.—I do not see how I can pass upon that until I go into the law of the case, and I will have to reserve my decision on that question until I have read the cases. I think we will make better time by admitting it subject to your objection

(Testimony of H. W. Furlong.)

than stopping now and urging the legal questions and thereby get through with the witnesses. [215]

**Deposition of U. L. Dike, for Plaintiff.**

U. L. DIKE, a witness called by the plaintiff, in his deposition given in New York City on the 11th day of May, 1915, testified as follows:

Interrogatory No. 1. What is your full name?

A. Uburto L. Dike.

Int. No. 2. Where do you reside? A. 601 West 160 Street, New York City.

Int. No. 3. During the months of September, October and November of the year 1911, where did you reside, and in what business were you engaged?

A. I resided in Sacramento, and I was engaged in the real estate business.

Int. No. 4. Were you connected with a corporation named and called the California Colonization Company during the months of September, October and November, and if so state the kind of business the corporation was engaged in? A. I was connected with the California Colonization Company during the months of September, October and November. The corporation was engaged in the real estate business.

Int. No. 5. If you were an officer of that corporation, state what office or offices you held?

A. I was the secretary-treasurer of the corporation.

Int. No. 6. Kindly give the names of all the officers of the corporation California Colonization Company, and state whether or not there were any other

(Deposition of U. L. Dike.)

members or stockholders of said corporation. A. The officers were: President, A. L. Crane, Vice-President, G. A. Greene, and myself secretary-treasurer. These three were stockholders. There were no other members of the corporation.

Int. No. 7. State whether or not you, as an officer of said [216] corporation, ever had any dealings with a Miss Isabelle Garwood and a certain gentleman known as Dr. F. I. Ramos. A. Yes.

Int. No. 8. If so, state briefly the nature of those dealings. A. The dealings were the purchase of a piece of real estate for the account of Miss Garwood at her request.

Int. No. 9. In what way, if you know, was F. I. Ramos connected with it? A. Miss Garwood stated that she had a friend who would arrive in a few days who would help her select the property. A few days after Mr. Crane had been showing Miss Garwood around the country, Mr. Ramos arrived, and from that time on he accompanied us in viewing properties shown to Miss Garwood.

Int. No. 10. If you state that you effected a sale of a piece of land in Sutter County to Miss Garwood, kindly state what your representations were to Miss Garwood in reference to the number of acres which the said land consisted of. A. We did effect a sale to Miss Garwood of a ranch belonging to Scheiber Bros., which we represented to contain six hundred acres, three hundred of which was in alfalfa, and the balance in pasture land.

Int. No. 11. If you say that you were the agent

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in effecting the sale of the Scheiber Brothers land to Miss Isabelle Garwood, the plaintiff in this action, kindly state what your representations were in reference to whether or not said land was all level, and state what your representations [217] were as to what the said land was adapted to raising.

A. I was the agent for Scheiber Brothers in the sale to Miss Garwood and represented the said land to be level. We stated the land was adapted to raising alfalfa; that three hundred acres were in alfalfa and the balance being used for pasture, but most of it adapted to alfalfa.

Int. No. 12. Did you make any representations to said plaintiff in this action, Miss Isabelle Garwood in reference to what, if anything, was at that time growing upon said tract of land? A. Yes, we represented that there were three hundred acres of alfalfa growing upon the land.

Int. No. 13. If you state that a certain number of acres of said land was at that time planted to, and producing, alfalfa, what, if anything, did you tell her was the balance of the land used for? A. For pasture and most of it adapted to the growing of alfalfa.

Int. No. 14. Referring to the sale of this land to the plaintiff, Miss Garwood, did you or your corporation ever give any money to Mr. F. I. Ramos? A. We did.

Int. No. 15. If you answer the next preceding question in the affirmative, kindly state just why this was done. A. Because after selecting the land he

(Deposition of U. L. Dike.)

made the demand that he was to receive one-half of the commission or he would call the deal off.

Int. No. 16. If you answer Interrogatory Number Fourteen in the affirmative, kindly state just what [218] Dr. F. I. Ramos said in respect to his receiving money in the transaction.

A. He did not say anything to me, he fixed the deal up with Mr. Crane, and from what Mr. Crane told me, he said he could not spend his time for nothing, but must receive some compensation, and that unless he received one-half of the commission he would call the deal off.

Int. No. 17. Kindly state whether or not, in the month of July, or thereabouts, in the year 1912, in the city of Sacramento, State of California, in the presence of Mr. Bing C. Brier, the shorthand reporter, and Mr. Wm. H. Devlin, the attorney, and Miss Isabelle Garwood, the plaintiff in this action, after first taking the oath and being duly sworn to tell the truth, you gave your deposition in an action which was at that time pending in the State Court in Sutter County, in which said Miss Isabelle Garwood was the plaintiff and the Scheiber Brothers were the defendants. A. I do not remember the date, but I do remember testifying in the presence of the people mentioned, and in the action of Miss Isabelle Garwood against Scheiber Brothers.

Int. No. 18. If you answer interrogatory number seventeen in the affirmative, kindly state whether or not, at said time and place, in said deposition, the following questions were propounded to you by Mr.

(Deposition of U. L. Dike.)

Devlin, and whether or not the following answers were given by you: [219]

Q. (By Mr. DEVLIN.) By the way, you were paid by Scheiber Brothers for making the sale?

A. Yes, sir.

Q. Your company paid Mr. Ramos some money?

A. Yes, sir.

Q. How much? A. Fifteen hundred dollars.

Q. Out of your commission? A. Yes, sir.

Q. Why was that paid?

A. Because he demanded it; he wouldn't let the sale go through unless we paid him.

Q. What did he say about it? A. He couldn't come out there and work for his health; he would have to have something. A. To the best of my recollection those were the questions propounded and the answers given.

Int. No. 19. If you answer interrogatory number seventeen in the affirmative, kindly state whether or not at said time and place, in said deposition, the following questions were propounded to you by Mr. Devlin, and whether or not the following answers were given by you:

Q. (By Mr. DEVLIN.) You told her that there was six hundred acres in the place, didn't you?

A. Yes. Q. And then did you tell her anything about it all being level? A. Yes, it is level, yes, we agreed that it was level, yes.

Q. What did you tell her that the rest of the property was in after deducting the three hundred acres of alfalfa? A. Pasture.

(Deposition of U. L. Dike.)

Q. All pasture? A. Pasture, yes. A. To the [220] best of my recollection those questions were propounded and those answers were given by me.

Int. No. 20. Directing your attention to the testimony as quoted in interrogatories Nos. 18 and 19, will you kindly state whether or not, if such questions were asked of you and such answers were given by you, the above testimony as quoted is substantially correct, and, if it is not correct, in what particulars it is inaccurate? A. To the best of my recollection it is substantially correct.

Int. No. 21. Kindly state whether or not you had a written contract with the owners of the land in question for the sale of the said land, and in the event that you say that you did not have a written contract, kindly state just what authority you did have, or at least, what authority the California Colonization Company had for the sale of said land; and also kindly state whether or not the authority conferred upon you or the California Colonization Company was, after the sale, in any way confirmed or ratified? A. Before the organization of the California Colonization Company, I personally had a contract from the Scheiber Brothers for the sale of this land, and at the expiration of this contract a new contract for the sale of this land was given to the California Colonization Company which expired a short time before the ranch was shown to Miss Garwood, but after that we had a verbal agreement with Scheiber Bros, to show the ranch, and before the deal was completed, [221] had received writ-

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ten authorization to make the sale, from Scheiber Brothers. The sale was confirmed and ratified by the Scheiber Brothers.

Int. No. 22. After the sale was effected, did the owners pay you or the said California Colonization Company the fee or commission previously agreed upon, provided there was a commission previously agreed upon, and, if so, what was the amount of the said fee or commission? A. They paid us commission which amounted to \$3,750. The commission was previously agreed upon.

#### ANSWERING CROSS-INTERROGATORIES.

Cross-interrogatories on Behalf of Defendants.  
(By Mr. HEWITT.)

Int. No. 11a. Did you and Miss Garwood and Mr. Ramos go to the Scheiber ranch before any contract of purchase was made between the Scheibers and Miss Garwood? A. Yes.

Int. No. 11b. How many times, if any, did you and Miss Garwood visit the ranch of Scheibers before any contract of purchase was made, if one was made? A. I cannot tell the exact number, but a number of times, three or four.

Int. No. 11c. How many times, if any, did you, Miss Garwood, and Mr. Ramos visit the ranch of Scheibers before any contract was made for the purchase thereof by Miss Garwood? A. I cannot tell the exact number, but a number of times, three or four.

Int. No. 11d. If you went to the ranch with Miss Garwood and Mr. Ramos before any contract of

(Deposition of U. L. Dike.)

purchase was [222] entered into between Miss Garwood and the Scheibers, what was the object of so doing?

A. That they might be fully satisfied with the condition of the ranch.

Int. No. 11e. If you went to the ranch with Miss Garwood and Mr. Ramos before any contract of purchase was entered into between Miss Garwood and the Scheibers, which parts of the ranch did you go over, if any, and how did you go over it? A. We drove around the road and through the fields in an automobile and then we walked over parts of it; parts which they wanted to examine more carefully.

Int. No. 11f. If you went to the ranch with Miss Garwood and Mr. Ramos, did you point out the boundary of same. A. Yes.

Int. No. 11g. If you went to the ranch with Miss Garwood and Mr. Ramos, state why you went, how many times you went, who was with you, the object of the visit or visits, and what was said, if anything, to Miss Garwood about the boundaries of the ranch, the acreage contained therein or the acreage planted to any particular products?

A. We went for the purpose of selling the property to her, a number of times, at least three or four times, with Miss Garwood, Mr. Ramos and the chauffeur. The object of the visits was to examine the ranch and satisfy them of its qualities and desirability as a dairy [223] ranch. About the boundaries, we drove along the line of the property where the roads followed the line and walked over to

(Deposition of U. L. Dike.)

the line in places where it left the road, and also pointed the boundary line by fences, levee and river boundary. We stated the acreage to be six hundred acres, three hundred acres planted to alfalfa and the balance pasture land, parts of which was adapted to alfalfa.

Int. No. 11h. If you effected a sale of the ranch to Miss Garwood, was it sold as a whole tract or by acre? A. It was sold as a whole tract containing six hundred acres.

Int. No. 11i. Had you or your company any written agreement with the Scheiber Brothers for the sale of the ranch? A. We had a written agreement which had expired just previous to showing the property to Miss Garwood.

Int. No. 11j. If not, what arrangements did you have with them concerning the sale? State such arrangements fully. A. We first called the Scheiber Brothers on the telephone and received from them authority to show the property on the same terms and conditions as set forth in the contract which had expired, and a short time before the deal was closed we received written authority. The arrangements of sale were that we should sell the property for \$75,000 or \$125 an acre, out of which we were to receive 5% commission.

Int. No. 11k. Did the Scheibers ever authorize you to sell the [224] ranch by the acre, and did you sell it by the acre? A. No, we sold it as a whole.

Int. No. 11l. In your conversation with Miss Garwood, did you refer to the ranch under any par-

(Deposition of U. L. Dike.)

ticular name, and if so what name? A. I did refer to it as Scheiber Brothers' Dairy Ranch.

Int. No. 11m. At any time that you visited the ranch with Miss Garwood, if you did so visit it, did you go on to the levee along or near the river? A. I went on to the levee, but Miss Garwood did not.

Int. No. 11n. Did you have any conversation with Miss Garwood on any of these visits to the ranch, if such visits were made, about the timber between the levee and the river and if so what was that conversation? A. I did. As we were just inside the levee I invited Miss Garwood to step on top of the levee that I might show her the timber land between the levee and the river, but she remarked that she could see it from the machine and that she did not care to climb up the side of the levee.

Int. No. 11o. In any of the visits to the ranch with Miss Garwood, did you go or drive near the levee, and if so for what distance? A. We drove along the foot of the levee I think each time we visited the ranch for almost the entire width of the west end of the ranch.

Int. No. 11p. When you visited the ranch with Miss Garwood, if you did so visit it, from what point did you approach it and what course did you follow after reaching it? A. Sometimes we would enter the ranch from the east side, other times from the northwest corner at the foot of the levee and from this point [225] we would continue either along the roads leading through the ranch or through the fields, both of which courses were taken frequently.

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Int. No. 11q. In any of these visits to the ranch made by you and Miss Garwood, if such visits were made, did you point out to her the boundaries of the ranch and if so what did you mention as the boundaries? A. We did point out the boundaries and mentioned certain fences which constituted the south-east and north boundaries and the river bank representing the west boundary.

Int. No. 16a. If you ever met one F. I. Ramos state where, when and under what circumstances, A. I did meet Mr. Ramos in Sacramento at the office of our Company, California Colonization Co. He was brought there by Miss Garwood and introduced as her friend who would assist her in selecting some property which she might buy.

Int. No. 16b. Did you have any conversation with Miss Garwood concerning her business relations with F. I. Ramos, and if so what, where and in whose presence did such conversation take place, and what was the conversation? A. I had a conversation with Miss Garwood in the office of the California Colonization Company stating she had a friend who would assist her in selecting some property which she might buy, and he would arrive in a few days. She said he was her friend and she would rely very much on his judgment. This conversation was in the presence of the employees and Mr. A. L. Crane, president of our Company. [226]

Int. No. 16 c. If, to your knowledge, he acted for any person in the negotiations for the purchase of the Scheiber property, state for whom he so acted

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and how you know he acted for such person or persons? A. Mr. Ramos acted in the purchase of the Scheiber Brothers ranch as the agent of Miss Garwood and my knowledge of this fact is that he demanded a portion of the commission received for making the sale.

Redirect Interrogatories on Behalf of Plaintiff.  
(By Mr. MACOMBER.)

Interrogatory No. 1. When did Ramos, if he ever did so, first speak about getting some money out of the deal for himself? A. After a deposit had been made by Miss Garwood for the purchase of the Scheiber Brothers' ranch.

Interrogatory No. 2. Did you at any time ever say or tell anything to Miss Garwood about money being paid to Dr. Ramos, and if so, what did you ever say to her about it? A. Yes, I did. I think after Dr. Ramos' death one day when she was in the office of the California Colonization Company accusing me of making a large amount out of the sale when I told her that \$1500 of the commission we should have received was paid to Mr. Ramos, and that she had received that through his estate.

Interrogatory No. 2a. If you say that the California Colonization [227] Company did give a part of its commission to Dr. Ramos, and if you say that you did not say anything to Miss Garwood about it, what was the reason or object why this knowledge was kept from her? A. There was no reason for keeping the knowledge from her, except the usual reason that agents do not discuss division

(Deposition of U. L. Dike.)

of commissions with principals.

Interrogatory No. 3. Did the California Colonization Company ever have any understanding or agreement with Dr. F. I. Ramos to the effect that said F. I. Ramos would receive some money out of the commission received by said California Colonization Company for selling said or any land? A. No, not until after the deposit was made.

Interrogatory No. 4. Can you, as an officer of said California Colonization Company state whether or not any officer of said California Colonization Company either on behalf of said corporation or as an individual ever agreed to give any money to F. I. Ramos? A. Mr. A. L. Crane, president of the Company agreed after the deposit was made for the Scheiber Brothers' Ranch.

Interrogatory No. 5. Was the sharing of any commission for the sale of any real estate, with F. I. Ramos, or the giving of any money, for any purpose, to F. I. Ramos, ever discussed, or talked about by you or any other officer of the California Colonization Company? A. It was talked [228] over a good deal between the officers of the Company.

Interrogatory No. 6. Can you, as an officer of the California Colonization Company, state whether or not that corporation, by and through its officers, ever, at any time, decided to give said F. I. Ramos any part of its commission for the sale of real property? A. It did decide to give Mr. Ramos a part of the commission.

Interrogatory No. 7. If you answer Interroga-

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tory No. 6. in the affirmative, kindly state just when and where this decision took place, and by and through what officers it was made? A. It took place after the deposit was made and it was made through Mr. Crane, the president, at the office of the company.

Interrogatory No. 8. Did you, as an officer of said California Colonization, ever agree with any other officer of said California Colonization Company that said California Colonization Company should pay any money to F. I. Ramos or share with said F. I. Ramos any commission for the sale of any real estate? A. I did.

Interrogatory No. 9. If you answer the next preceeding question in the affirmative, kindly state when this agreement took place, and also state what was said by and between you and the other officers at the time, and also state whether or not said agreement or understanding was ever carried out or acted upon by said California Colonization Company?

A. The agreement took place in [229] the offices of the company after the deposit had been made by Miss Garwood, between the president, and myself.

While I cannot give the exact discussion, the substance was an agreement to pay Mr. Ramos one-half of the net commission received, which after the deal was closed was carried out by the payment to Mr. Ramos of \$1500.

Interrogatory No. 10. If you should state that the California Colonization Company ever actually paid any money to F. I. Ramos, kindly state whether

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or not it was a part of commission money, for the sale of real estate, and, if so, what sale, that particular commission was derived from? A. We did pay Mr. Ramos a part of the commission received from the sale of the Scheiber Brothers' Ranch to Miss Garwood.

Interrogatory No. 11. If you state that the California Colonization Company paid to F. I. Ramos a portion of the commission received by said corporation for the sale of the land of the Scheibers in Sutter County to Miss Garwood, then kindly state just how long it was before the sale was agreed upon that the California Colonization Company agreed with F. I. Ramos to share the commission with him. A. It was after the sale after the deposit had been made.

Interrogatory No. 12. If you should state that Miss Garwood agreed [230] to take the land, and put up the deposit on or about Monday the 25th day of September, 1911, then kindly state about how many days it was before that time that the California Colonization Company made the agreement to share the commission with F. I. Ramos, —if it ever did make such an agreement? A. It was after that date, I think, a day or two.

Interrogatory No. 13. Referring to interrogatory number seventeen, in the list of interrogatories on your direct examination by me, did you or did you not, at the time and place referred to in said interrogatory number seventeen, give the following testimony, that is, were, or were not, the following ques-

(Deposition of U. L. Dike.)

tions propounded to you, and did you, or did you not, give the following answers:

Q. (By Mr. DEVLIN.) When did he first ask you for money? A. He never asked me for money at all. Q. Whom did he ask? A. Mr. Crane. Q. And did Mr. Crane tell you about it? Did he ever talk to you about money? A. Yes. Q. What did he say to you? A. He said that he gave Mr. Ramos a statement of the acres and that he would divide the commission with him. Q. (Mr. DEVLIN.) For what? A. If they bought the property. Q. You knew Miss Garwood was buying the property, didn't you? A. We supposed she was. [231]

Q. Don't you know that you made a contract with her? A. Yes, but that was later. That was not at this time. That was later. That wasn't the time we made the agreement with Doctor Ramos.

Q. Miss Garwood came to you alone first? A. She reported that she had a friend coming, and she didn't want to do anything until her friend came to advise her.

Q. She told you Ramos was her friend and she wanted advice? A. Yes. Q. Wanted him to advise her, is that the idea?

A. Yes. Q. When did Ramos first speak about getting some money? When did you learn it?

A. It was soon after the negotiations opened.

Q. When was that?

A. I do not know as to that, I know Mr. Crane came and told us that he made an agreement with him to divide the commission.

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A. To the best of my recollection the questions were propounded to me and I did give those answers.

Interrogatory No. 14. If you say that you gave the foregoing testimony, then who do you refer to in the answer to the last question just hereinabove set forth, when you said that Mr. Crane came and told "us," who did you mean by "us"?

A. Mr. Greene and myself.

Interrogatory No. 15. If you answer direct interrogatory number seventeen in the affirmative, kindly [232] state whether or not, at said time and place, the following questions were asked of you by Mr. Devlin, and the following answers given by you?

Q. Did you tell Miss Garwood Ramos wanted fifteen hundred dollars, and you agreed to give him fifteen hundred dollars? A. No, sir.

A. Yes, as nearly as I can recollect, the said question was asked and the said answer given by me. [233]

Upon further examination upon interrogatories direct and cross-propounded by the respective parties, the said U. L. Dike testified as follows:

Direct Interrogatories on Behalf of Plaintiff.

Interrogatory No. 1. What is your full name? You are the Mr. U. L. Dike who gave your deposition in this action on the 11th day of last month?

Answer No. L. Uburto L. Dike. I am the Mr. U. L. Dike who gave the deposition in this action on the 11th day of May, 1915.

Interrogatory No. 2. I wish to call your attention

(Deposition of U. L. Dike.)

to certain testimony which you gave in your deposition before Notary Public Moses Cohen in this action on the 11th day of May last. I will quote from the deposition as follows:

Interrogatory No. 13: Referring to interrogatory No. 17 in the list of interrogatories on your direct examination by me did you or did you not, at the time and place referred to in said interrogatory number seventeen give the following testimony, that is, were, or were not, the following questions propounded to you, and did you, or did you not, give the following answers: Question. (By Mr. Devlin.)—When did he first ask you for money? A. He never asked me for money at all. Q. Whom did he ask? A. Mr. Crane. Q. And did Mr. Crane tell you about it? Did he ever talk to you about money? A. Yes. Q. What did he say to you? A. He said that he gave Mr. Ramos a statement of the [234] acres, and that he would divide the commission with him. Q. (Mr. DEVLIN.) For what? A. If they bought the property. Q. You knew Miss Garwood was buying the property, didn't you? A. We supposed she was. Q. Don't you know that you made a contract with her? A. Yes, but that was later. That was not at this time. That was later. That wasn't the time we made the agreement with Dr. Ramos. Q. Miss Garwood came to you alone first? A. She reported that she had a friend coming, and she didn't want to do anything until her friend came to advise her. Q. She told you Ramos was her friend and she wanted advice? A. Yes. Q. Wanted him to advise her, is that the idea?

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A. Yes. Q. When did Ramos first speak about getting some money? When did you learn it? A. It was soon after the negotiations opened. Q. When was that? A. I do not know as to that; I know Mr. Crane came and told us that he made an agreement with him to divide the commission.

A. (Given by Mr. U. L. Dike in his deposition on or about May 11th, 1915, in response to the question as to whether or not he had given the foregoing testimony.) To the best of my recollection the questions were propounded to me and I did give those answers.

Answer No. 2. The said questions were propounded to me and [235] I did give those answers.

Interrogatory No. 3. I would like to ask you at this time, Mr. Dike, to state whether or not the foregoing testimony which you state in your last deposition you gave in response to questions propounded to you in Sacramento by Mr. Devlin is substantially correct; is that testimony in any way untrue, or incorrect?

Answer No. 3. Not that I know of. It is substantially correct.

Interrogatory No. 4. If you will carefully consult your memory, Mr. Dike, will you not state that you may be mistaken when you say that the agreement which the officers, as such, of the California Colonization Company, made with Dr. F. I. Ramos, to give him one-half of the Company's commission was made after the deposit was put up by Miss Garwood?

Answer No. 4. So far as I know, the agreement

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to divide the commission with Dr. F. I. Ramos may have been made with Mr. Crane, the president of the California Colonization Company, before the deposit was put up by Miss Garwood. What I desire to make clear is that the first time I knew about any agreement to divide commission with Dr. Ramos was after the deposit was put up by Miss Garwood when I learned of it from Mr. Crane.

Interrogatory No. 5. If Dr. Ramos refused to allow the sale to go through until he was paid his share of the commission, is it not the fact that he [236] enforced his demand before allowing Miss Garwood to put up the deposit of five thousand dollars?

Answer No. 5. I don't know. The arrangement to divide commission was made between Mr. Crane and Dr. Ramos without my knowledge. Whether Mr. Crane made the arrangement before the deposit was made by Miss Garwood or afterward I don't know. I do know that the deposit had already been made by Miss Garwood when Mr. Crane told me of the arrangement to share commission with Dr. Ramos.

Interrogatory No. 6. If you feel sure that there had been no negotiations with Ramos, or between Dr. Ramos and the Company until after the deposit was paid, will you kindly explain fully just how and in what manner Ramos proposed or threatened to compel the California Colonization Company to pay him the money?

Answer No. 6. I am not sure that there had not been any negotiations with Dr. Ramos until after the

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deposit was made. I have already explained in my previous answers just when I learned of the arrangement with Dr. Ramos. Dr. Ramos never made any threats to me. I don't know what he said to Mr. Crane which led Mr. Crane to make the arrangement with Dr. Ramos.

Interrogatory No. 7. If there had been no negotiations with F. I. Ramos as to his receiving one-half of the commission until the deposit was put up, then you had five thousand dollars in your possession, and the contract signed, didn't you? [237]

Answer No. 7. At the time, I received the \$5,000 deposit and when it came into my possession I knew nothing at all that negotiations had been made to divide the commission with Dr. Ramos.

Interrogatory No. 8. If the deal was signed and agreed upon and the bargain secured by the deposit by Miss Garwood of five thousand dollars, then why was it necessary to split the commission with F. I. Ramos? Kindly explain this matter, by stating fully and exactly just what was said by Ramos and by you and each of you, state everything that was said about the matter by you and by Mr. Crane, and by Mr. Green and by Mr. F. I. Ramos.

Answer No. 8. It wasn't necessary except that Mr. Crane had agreed to give him one-half of the commission as I have already stated. Mr. Greene didn't take any part in the negotiations at all, he being out of the city. When Mr. Crane told me of the agreement to divide the commission with Dr. Ramos I protested and I objected. Then Dr. Ramos

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showed me a card signed by Mr. Crane, the president of the company, agreeing to give Dr. Ramos one-half of the commission and when he showed me the card I consented. I don't know when this card was signed by Mr. Crane.

Interrogatory No. 9. Is it not a fact, Mr. Dike, that at the same moment Dr. F. I. Ramos handed over [238] the check for the five thousand dollars for the deposit, a check for fifteen hundred dollars payable to F. I. Ramos was handed to said F. I. Ramos, and is it not a fact that Miss Garwood was not present at the time. Kindly answer this question fully and explicitly.

Answer No. 9. No, it is not a fact. Check paid to Dr. Ramos was not until the deal was closed and we had received our commission for negotiations of the sale from Scheiber Bros.

Interrogatory No. 10. Can you at this time state, Mr. Dike, the day and month and the year that the deposit was put up by Miss Garwood?

Answer No. 10. I cannot.

Interrogatory No. 11. Can you at this time state, Mr. Dike, the day and month and the year that the agreement was made between the California Colonization Company and Dr. F. I. Ramos to the effect that said Ramos was to share in the commission?

Answer No. 11. I cannot.

Interrogatory No. 12. If you can fix those dates in your mind, kindly explain just how you do it?

Answer No. 12. I cannot.

Interrogatory No. 13. If you are not able to ex-

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plain how you fix those dates in your mind, will you then kindly explain just how you remember that the negotiations with Ramos for the sharing of the commission were not commenced until after the deposit was put up?

Answer No. 13. I am not able to fix the dates, and I have already answered that I do not know whether [239] the negotiations with Ramos for sharing the commission were commenced before or after the deposit was put up because Mr. Crane did all the negotiating, not I.

Interrogatory No. 14. Will you kindly state what person it was that personally handed over the deposit of five thousand dollars? Was it Dr. Ramos, or was it Miss Garwood? If it was Dr. Ramos, was Miss Garwood present at the time?

Answer No. 14. Miss Garwood made out the check and gave it to me in Dr. Ramos's presence in the office of the California Colonization Co.

Interrogatory No. 15. I would like to ask you, Mr. Dike, what, if anything, you said to Miss Garwood at the time you were making the sale, about the amount of alfalfa that the land would produce. Kindly state what you said to Miss Garwood about the number of acres in the land, and the number of cuttings of alfalfa that could be taken from the land each year, and the number of tons of alfalfa, which each acre would produce a year.

Answer No. 15. To the best of my knowledge I told Miss Garwood that the ranch had about 300 acres of alfalfa and that it would produce five or six

(Deposition of U. L. Dike.)

cuttings to the year and cut from eight to ten tons to the acre each season.

Interrogatory No. 16. Kindly state, Mr. Dike, whether or not, in the month of July, or thereabouts, in the year 1912, in the city of Sacramento, State of California, in the presence of Mr. Bing [240] C. Brier, the shorthand reporter, and Mr. Wm. H. Devlin, the attorney, and Miss Isabelle Garwood, the plaintiff in this action, after first taking the oath and being duly sworn to tell the truth, you gave your deposition in an action which was at that time pending in the State Court in Sutter County in which said Miss Isabelle Garwood was the plaintiff and the Scheiber Brothers were the defendants.

Answer No. 16. I did.

Interrogatory No. 17. If you answer interrogatory No. 16, just above propounded to you, will you kindly state whether or not, at said time and place, in said deposition you gave the following testimony.

Q. What was the conversation about the ranch?

A. I told her the ranch was a dairy ranch and spoke of the alfalfa, that there was three hundred acres of alfalfa. Q. Did you say anything about the number of crops per season of alfalfa it produced? A. Yes.

Q. What did you say about it? A. Five and six cuttings in the year. And cut from eight to ten tons to the acre each season.

Answer No. 17. To the best of my memory and belief I gave said testimony.

Interrogatory No. 18. If you should state that you did give the testimony just read to you, in interroga-

(Deposition of U. L. Dike.)

tory No. 17, will you kindly state whether [241] or not said testimony is in all respects the truth, that is, is it true that you told her that the land was six hundred acres, and that it cut five or six cuttings a year, and that it cut eight to ten tons to the acre, per season?

Answer No. 18. Said testimony is in all respects true, but the question assumes that I testified there were 600 acres of alfalfa. I did not so testify. I testified that there were 600 acres in the ranch and that there were 300 acres planted to alfalfa.

Cross-Interrogatories Proposed by Defendants.

15-a. Did you at any time or place ever represent to Miss Garwood that the land, (Scheiber Ranch) contained exactly six hundred acres?

A. 15-a. No, I said 600 acres more or less.

15-b. Did you at any time or place represent to Miss Garwood that there were exactly three hundred acres of alfalfa?

A. 15-b. No, I said there were about 300 acres of alfalfa.

15-c. Have you in any deposition made by you at any time or place intended to say that in your transactions with Miss Garwood concerning the sale of the Scheiber property there were exactly six hundred acres of land in the Scheiber ranch?

A. 15-c. No.

15-d. Have you in any deposition made by you at any time or place intended to say that, in your transactions with Miss Garwood concerning the sale of the Scheiber property there were exactly three

(Deposition of U. L. Dike.)

hundred acres of alfalfa growing on the Scheiber ranch at the time of such transactions? [242]

A. 15d. No.

15e. In your negotiations with Miss Garwood for the sale of the Scheiber property did you show her the alfalfa fields, and if so, did you say to her unqualifiedly that there were three hundred acres in alfalfa.

A. 15e. I did show her the alfalfa field but I didn't state to her unqualifiedly that there were 300 acres in alfalfa. I said there were about 300 acres.

15f. In your negotiations with Miss Garwood for the sale of the Scheiber property did you show her the boundaries of the ranch, and if so, did you say to her unqualifiedly that the ranch contained six hundred acres of the land.

A. 15f. I showed her the boundaries, but I didn't tell her unqualifiedly that the ranch contained six hundred acres of land; I said more or less. [243]

Mr. MACOMBER.—That is our case, if your Honor please.

The COURT.—Call the first witness for the defendants.

Mr. HEWITT.—I understand that these depositions have gone in subject to the objection?

The COURT.—Yes.

Mr. HEWITT.—If your Honor please, I desire to make a motion at this time. Defendants at this point move for a judgment or nonsuit and dismissal of the action against defendants and each of them on the following grounds:

(Deposition of U. L. Dike.)

First, that plaintiff has failed to show or establish by any evidence offered by her that she has been damaged to any extent by the purchase of the property described in the complaints herein at the price paid by her therefor, or in any manner or at all;

Secondly, that plaintiff has failed to show or establish by any evidence offered by her that she was defrauded in the purchase of the property described in the complaints herein, in any manner or to any extent.

Third, that plaintiff has failed to show or establish by any evidence offered by her that any material misrepresentations respecting the property sold to her by the defendants herein and described in her complaint were ever made to her by said defendants or either thereof.

Fourth, that plaintiff has failed to show or establish by any evidence offered by her that the property described in her complaints herein was in valuation at the time of her purchase worth any sum less than the amounts paid by her therefor. [244]

Fifth, that plaintiff has offered no evidence proving or tending to prove that in the purchase of the property described in her complaints herein she relied upon the representations of defendants or either of them, but on the contrary the evidence shows that she purchased said property and all thereof after a personal examination and inspection of the same by herself and her agent F. I. Ramos.

Sixth, that it does not appear from any evidence offered by plaintiff that she relied upon or that she had

(Deposition of U. L. Dike.)

a right to rely upon any representations made by the California Colonization Company or any agent of said company, in the purchase of the property described in her complaints herein, or that said company or any officer or agent of said company had authority from the defendant to make any representations concerning said property or any part or portion thereof.

Seventh, that plaintiff has offered no evidence showing or tending to show that the California Colonization Company, or any officer or agent of said company were the agents of defendants in the sale to her of the property described in the complaint herein, but on the contrary it appears from the evidence that all contracts for the sale of said property were made directly between plaintiff and defendants, and that the only offices performed by said California Colonization Company and its officers were in finding a purchaser of said property in the person of plaintiff upon the consideration and terms expressed in the written contract for the sale thereof, entered into between plaintiff and defendant on the 27th of September, 1911, and the deed made and delivered by defendants to plaintiff pursuant to said contract on the first day of November, 1911. [245]

Eighth, that plaintiff has offered no evidence showing or tending to show any fraudulent transactions between plaintiff or any agent of plaintiff and these defendants; that it has not been established that the defendants, or any of them, had any knowledge whatever of any fraudulent acts, if such they were, per-

(Deposition of U. L. Dike.)

formed by F. I. Ramos, the agent of plaintiff, in the transactions alleged in the complaints herein.

Ninth, that it has not been shown or proven by any testimony offered in the case before the court that any representations were ever made to plaintiff by defendants with the intent to deceive or mislead her in the matter of the purchase of the property described in her complaints.

The COURT.—Now, it is necessary for me to read the supplementary deposition of Mr. Dike before I can be prepared to hear this motion; I do not feel that I can hear it until I have heard all the testimony offered by the plaintiff. I will take this matter up when court reconvenes at say half-past two, because I want to have time to carefully read that supplemental deposition.

(A recess was here taken until two P. M.)

Mr. MACOMBER.—There are two photographs that I would like to introduce, your Honor, those two photographs identified by Mr. Furlong.

The COURT.—The photographs that I have already examined?

Mr. MACOMBER.—Yes. In reference to these depositions—these depositions have not been offered in evidence yet formally.

The COURT.—The understanding was they would be received subject to the defendant's objection.

Mr. HEWITT.—I wish to add one additional ground to the motion for a nonsuit, numbered ten, that it appears from the [246] evidence in these cases that all contracts relating to the sale of the prop-

(Deposition of U. L. Dike.)

erty described in the complaints herein were written contracts, and they are presumed to have contained all agreements and warranties with reference to the condition or quality of said property.

The COURT.—Did you object to the testimony on that ground?

Mr. HEWITT.—In some instances, your Honor.

The COURT.—I remember that you did in one or two instances, but I did not understand you to object to all the conversations with reference to the acreage and quality of the ground. Of course, the record will show.

Mr. HEWITT.—I could not say with respect to that; probably the rule would be that even if I had so objected, that the court could go to the foundation of the matter.

The COURT.—If there were fraud in the transaction.

Mr. HEWITT.—Yes; but as to some matters the objection was made.

(Thereupon, counsel proceeded to the argument of the nonsuit, at the conclusion of which the following proceedings were had.)

The COURT.—I think you had better put in the testimony and let me take the whole case, that is, when it is submitted, because if I were to stop now to read these authorities, as I must do before I ruled on this question, we would not get through. I think it would be an injustice to either side not to read them. The motion will be denied.

Mr. MILLER.—Exception.

## TESTIMONY FOR THE DEFENSE.

**Testimony of Charles F. Silva, for Defendants.**

CHARLES F. SILVA, called for the defendants, testified as follows: [247]

My name is Charles F. Silva. I reside in Sacramento. I am a butcher and farmer by occupation. I own real property. In the year 1910 I owned property within six miles of the Scheiber Brothers' ranch. I have frequently bought and sold land similar to this. I know well the ranch that was sold to Miss Garwood. I have known that ranch for about 32 or 33 years. I farmed it some; I have cut a good deal of hay on it. I have known it very well for years; I have pastured stock on it and cut hay on it. I have had a great deal of experience in buying and selling land similar to this. Some of it in that neighborhood, yes, some about 6 miles from there, about the same kind of land. A small tract on the same side of the river, and a large tract across the other side. I have had a great deal of experience in buying and selling stock. I bought stock everywhere, clear down into Mexico.

The COURT.—You need not go into the question with reference to the purchase of the personal property; I do not think the testimony is sufficient to show that they are entitled to recover anything on their claim that they were deceived with reference to the personal property. I think the principle involved with reference to that matter is so clearly settled that you need not waste the time of the Court in going into it unless you desire to do so.

Mr. MILLER.—If your Honor is going to grant a

(Testimony of Charles F. Silva.)

nonsuit in that case, we will submit that case.

The COURT.—I hold that plaintiff is not entitled to recover as to the personal property.

Mr. HEWITT.—And the other case, if your Honor please—I don't know just exactly what the custom is in this court, but did I understand that the motion for a nonsuit was either denied or taken under advisement for some future action?

The COURT.—It was denied. [248]

Mr. HEWITT.—I wish an exception to be noted to the ruling.

The COURT.—I said that when I came to decide the entire case, that I might, after I had examined all of the authorities, come to the conclusion that I should grant this motion, but that is my view of the rule at the present time.

Mr. MACOMBER.—As long as exceptions are in order, if it is the proper time, I will except to the Court's ruling with respect to the personal property.

The COURT.—There has been no motion made in that case, as I understand it.

Mr. MILLER.—Didn't your Honor understand the motion read in both cases?

The COURT.—No.

Mr. MILLER.—It was to apply to both cases.

The COURT.—I grant the motion as to the case involving the personal property and deny it in the other case.

Mr. MACOMBER.—We will note an exception to the personal property case ruling.

The WITNESS.—I am pretty sure that it was in

(Testimony of Charles F. Silva.)

1911 that I went to the ranch with this lady sitting here, I can't remember her by name. It was after the purchase of the property. A man by the name of Harvey, I can't give his initials, an automobile man, asked me to go with him and her to the ranch, and I did. I went over the property with her; with the lady that was sitting there, I cannot call her by name. I am now familiar with the character and condition of that property on the first day of November, 1911, and before that, and since. At that time the new levee was not constructed. I was familiar with the location of the old levee. I was thoroughly acquainted with the fact that some of the property [249] laid between the old levee and the Feather River, and to some extent up along the curve in the river. I know all about the former condition of the property, and its present condition. I have hunted all through that country.

Q. Now, Mr. Silva, do you know what the market value of that real property, the Scheiber Brothers ranch, bought by Miss Garwood, was on the first of November, 1911?

Mr. MACOMBER.—One moment. What do you refer to, the entire land?

Mr. MILLER.—Yes.

Mr. MACOMBER.—You ask him if he knew?

A. Yes, I do.

Mr. MILLER.—What was the market value?

Mr. MACOMBER.—We object to the question; we object to any testimony being taken as to the ranch in its entirety upon the ground that it is incompetent,

(Testimony of Charles F. Silva.)

immaterial and irrelevant, and not within the issues of this case, and has nothing to do with this controversy.

The COURT.—The objection is overruled.

Mr. MACOMBER.—We note an exception.

### EXCEPTION NO. 3.

In a conversation that I had with the lady, she was complaining to me about the property, and I said to her, after going over the ranch and going home, "If you want to dispose of this property I will give you what it cost you." She said she would let me know the next following day. The next day I met her at the Sacramento Hotel, and she said no, she would not. The market value of that land at that time was \$75,000. Yes, I had a conversation with the plaintiff on that occasion in which the question of the value of the land and what I would pay for it came up—\$75,000 was what I offered for it.

Mr. MILLER.—Q. Mr. Silva, did you on the occasion of the visit to the ranch with Miss Garwood, shortly after her purchase [250] of the Scheiber property, offer to pay her \$75,000 for that ranch?

Mr. MACOMBER.—We object to the question on the ground it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. MACOMBER.—Exception.

### EXCEPTION NO. 4.

A. Yes. I could not recall when that was, it was sometime after she bought the property, maybe three

(Testimony of Charles F. Silva.)

or four months, maybe five months, maybe six months, I could not recall. It was merely drawn to my attention, and I went up there and looked at the ranch. I know the ranch very well. I had been knowing the ranch for 37 years. I was absolutely in earnest in making that offer. I was absolutely prepared financially to do it, to take the property, yes, to pay her the cash. I never make offers without I am prepared to take them up. The lady was very much worked up over the property. I would like to have it very much.

Cross-examination.

Yes, absolutely in my opinion, the ranch was worth \$75,000. Yes, I do know all about real estate in that neighborhood. Yes, absolutely I know all about soils. I do absolutely know what good alfalfa is, and I know what bad alfalfa land is. That is my business, alfalfa lands. I know the number of tons per acre that good alfalfa land will produce. I know the number of cuttings a year that you would get off an acre of good alfalfa land. I am familiar with where that long strip of land comes up to Nicolaus, and how far it runs along the river. I know how far out it goes from the river. I have been in that neighborhood about 37 years. I was familiar with that land when Bill Regan had it. I was familiar with that land for the last 32 years. I am familiar with a good many of the sales that have taken place in those years—not all of them. I know the sales that have taken place of recent [251] years. I know what has been paid for land there. For that reason I am absolutely competent to tell what that land is worth. Good

(Testimony of Charles F. Silva.)

alfalfa land along there is worth \$250 an acre. That is what it is worth now. That is what it was worth in 1911; about the same thing, it has been for some time good alfalfa land. Any land that will produce 5 or 6 crops of alfalfa is worth that much money; that is about 10 tons per acre per year; some 12, some 8, some less it is according to the kind of land you have. Very big yield; yes, 12 or 10 tons to the acre, 12 tons is a pretty big yield. 10 tons is a fair yield. Yes, it is \$250 an acre for subirrigated land. Most any of that land on that ranch is worth from \$100, \$125 to \$150. Most any land that will raise crops of barley, or raise crops of wheat, or anything like that. You know there is a division there on that land; that is, 2 different parts of land there, that is inside of the old levee. Not all of that land is worth \$250 an acre, I said some of it. Yes, I am familiar with the various parcels along there,—the Redfield farm, and the Claus Peters place. I know how far the subirrigation goes out from the river. That land outside of where the subirrigation is is very good land. There is some adobe, not a great deal; then there is spots of alkali on some of it, and the other is very good land; it is a mixture of land after you get the other way, in some ranches, not all the ranches. You can raise lots of alfalfa on adobe land when you put water on it, you have got to irrigate it. Yes, land that is subject to overflow will raise alfalfa. If the water is on it for a little while, it will kill it. Sometimes it don't take long to kill it; and other times it does; it depends upon how the water is; if the water is cold,

(Testimony of Charles F. Silva.)

it will take longer; if the water is warm, it will kill it within 24 hours, if the water is hot. If the weather is cold, it will sometimes take 10 or 12 days to kill it. That adobe land that you have to irrigate, will produce alfalfa if you irrigate it. It will not produce alfalfa without irrigation. That land you have to irrigate up there, that adobe land is worth [252] about \$75 or \$80 or \$100 an acre; most any land in that vicinity; I don't care where you go, is worth that amount of money, and has been for several years. In 1911 first-class alfalfa land along there was worth \$250 an acre. I bought some myself for \$250 an acre right there, just below, about 6 miles. They call it the Ramsey place,—not at that time, but before that. About 4 or 5 years before that, it was called the Ramsey place, below that, 160 acres. I bought 165 acres. It is about 5 or 6 miles from Nicolaus. It is right along the river bank, the same as any other land. I have not owned it for that long; it was longer ago when I bought that; I sold it 6 or 7 years ago. I bought it from a man by the name of Ramsey. It is this land which is marked the land of R. H. Shields; Shields bought it from a man by the name of Mahon. I owned it before him, quite a while ago; it is several years ago. Q. You paid \$250 an acre for it? A. I did. Q. Don't you know that Robert Shields paid \$100 an acre for that land? A. I can't help it what he paid. I know what I paid. Part of the land cost me \$250 an acre, and part of it did not. Q. Don't you know as a matter of fact that Rob. Shields got that land for \$100 an acre? A. I don't care what he

(Testimony of Charles F. Silva.)

got it for. Q. Don't you know that he did? A. I don't care what he got it for; I know what I paid. I don't know it; I don't know what he paid. I want to say to you, young man, right here now, that you can take a lot of these ranches down there that are not worth \$4 an acre, part of them, you understand; this ranch that you are talking about here, that I know I offered them \$75,000 for, and I know what land is worth. Yes, I know where the Saylor place is. It is right back below the Nicolaus ranch. Yes, right between the Nicolaus ranch, and the levee. I don't know how long Saylor has been there. I don't know when he bought the place. I do not know that Saylor paid \$100 an acre for that land 2 years before the plaintiff bought [253] this land of her's. There is a big difference between the Saylor land and the Nicolaus ranch. The Nicolaus ranch is considered to be the best piece of property in that vicinity, if you want me to tell you, the very best piece of property in that vicinity, the Nicolaus ranch is. You take some place right around there, the O'Keefe place, the Drescher place, all those places in there, but as you go down this way, the land is not as good as it is in that vicinity; you take the Claus Peter's place, that isn't worth that much; there is a lot of land that isn't, because you get into alkali. There is very little alkali on the Garwood place, one or two small spots in there; it is adobe, more; it looks like alkali, but it is more adobe. It is back of the road, the road divides that property into two. I mean it is down here in that quarter section, there is

(Testimony of Charles F. Silva.)

a road that divides that ranch in two, it is back of that road, a couple of spots there may be. In the southernmost portion of the ranch. There is not any alkali any other place on that ranch; I know there is not, because I have hayed all over that ranch. The Saylor place don't lay between the river and the Garwood ranch, it does not. Some of the Saylor place is far inferior to the Garwood place, and some of it is as good. I don't know what was paid for the Saylor place. Yes, the offer I made of \$75,000 for the ranch was made in good faith absolutely, I had the money. I have always been a good business man. I know the land values in that neighborhood. It is absolutely true that in making that woman an offer to buy that place at that time for \$75,000, I made the offer without knowing what the Saylor place sold for. I don't have to know what the other land is sold for. I know the Valley place; that is good land. Some of it is as good land as the Garwood place. It is as good land as the Garwood place. I know of its being sold, yes. I don't remember what it [254] was sold for, but I think \$150. Yes, I know that that and was put up for sale by the Probate Court of Butte County, and the highest bid given for that and was \$69 an acre. It was done just to cheat these heirs out of it, that is what it was done for. I did not buy the Valley land, because the title was not exactly right; there was quite a mix-up in that; that was the matter with that. Yes, I am sure about that title; there was considerable trouble about the title to the property. I don't know anything about what

(Testimony of Charles F. Silva.)

was said, I know the title was not perfect; it had to be made good, that is why it sold so much cheaper. I am thoroughly acquainted with land there, I know the people, know the heirs of that little piece of property, and it is a good little piece of property. No, it is not better than the Garwood place. I would like to be away from that town a little further, instead of being closer. I do not know that some of the heirs wanted to hold the land, and went into court, and had the Court order the land appraised, and that the highest appraisement was \$125 an acre for that land. I do not know that, I know what real estate is worth in that vicinity. Yes, I do absolutely. I do not remember anything about what that land was sold for. I am pretty sure that it was the year before she bought her land. I don't know that after hearing the testimony of the witness that the land was worth \$135 an acre, the Court refused to sign the order selling it for \$69 an acre, and that thereafter the heirs got together and sold the land for \$100 an acre. No, I don't know that. The Redfield farm, that is right along side, lying on the northwest boundary line of the Garwood place, it is very good land. It is about the same quality as the Garwood land. I remember the deal in 1901, only ten years before plaintiff bought this land, that land was sold by Redfield to the Scheiber Brothers for less than \$50 an acre. Yes, in 10 years' time land has increased in value from [255] \$50 an acre to \$250 an acre; yes, absolutely in that neighborhood, absolutely all over the State, practically, land has increased that much in value.

(Testimony of Charles F. Silva.)

The reclamation has been the cause of that increase. Reclamation has increased the value of that land up in there; before we had reclamation, that was flooded; since it has been reclaimed, it has increased the value of all the lands, all the bottom lands. The reclamation work was done to take care of the flood waters that came from these levees and ditches, and all such as that. Yes, all of this property in here, in District 1001, was assessed for that reclamation work. All that land was assessed inside the district. The Garwood land has been assessed for years for levee purposes. I do not know how much the assessment was on the Garwood place for that reclamation work. The good that the reclamation work did to this Garwood place was that it helped to keep water away from the back field, so that you could produce barley or alfalfa, or anything else. In a way you could produce these things before the reclamation work, but use it one year, you might have success in raising alfalfa one year and then lose it in the next. On part of that land it would not be a commercially practicable proposition to raise crops before the reclamation work was done, due to overflow. Most of the Garwood place, from the road back, I think probably 150 to 200 acres, more or less, was subject to overflow. I am not familiar with the contour lines up there. I know Mr. Borgman, and I know his property, that property is worth \$125 to \$150 an acre. It may be true that that land was sold for \$55 an acre five years ago, but the land is worth a great deal more within the last 3 or 4 years, since the reclama-

(Testimony of Charles F. Silva.)

tion work. I figure that there are 200 acres on that ranch worth \$250 an acre. That land is right along the road, straight back, around the buildings, the land that always has been in alfalfa, more or less. Yes, this part up near the levee. The remaining [256] part down toward the southeasterly corner is worth \$100, around there, more or less; that is, from the \$250 land down to the end, that is worth \$100 an acre. When I offered her \$75,000 for the place, I was taking the place as a whole when I offered that money. I have been all over the place. The Nicolaus ranch was always just so much; it was surveyed once for me, 600 and some odd acres, and it was always known as a very valuable ranch. I know exactly what the owners paid for the land, they paid around \$60 an acre. They paid \$60 an acre for the whole thing. That may be a mistake, I may be in error, but I don't think so. It may be that they paid only \$26,000 for the entire ranch, but I am pretty sure that the people who sold it to them was the Mutual Life Insurance Company, I think it was, and I understood the old gentleman to say that he gave \$60 for the property for 600 acres. I won't say that they paid \$26,000 for the ranch, I don't know about that. The land outside the old levee is good land; it is as good land as any land outside the levee. Supposing that the land is cleared off, it is worth just as much as any other land on that place; it will cost about \$60 or \$70 an acre to clear it off. After that land was cleared off, it would be good for raising alfalfa; you can raise anything under the sun on it. The over-

(Testimony of Charles F. Silva.)

flow can come there, and it won't bother it at all, because it is running water. Yes, I mean to say that if she had cleared that land off and planted it to alfalfa, before that levee was put there, it would have been good alfalfa land; it would raise alfalfa. There may be a portion next to the levee where the water would stay there, and that would kill it, but the most of it would raise alfalfa. I think it would cost \$60 an acre to clear that. At the time she bought the ranch, that land was worth \$250 an acre, provided it was cleared off. That land outside of the old levee could have been cleared off for \$60 an acre, and it then would [257] have been just as good as the other land, and by an expenditure of \$60 an acre the owner would have land worth \$250 an acre. You understand me, I mean it would be worth \$250 an acre now since the levee has been put up. The running water will not hurt alfalfa when it is from the river with high land, the way it is there. I mean to say that water could have come down over that land if she cleared it, and that would have been good alfalfa land. Yes, I remember the ranch before 1892; I know it well. Yes, there was some land out here that was out there before the levee broke in 1892. I don't recall whether there was any land out there at the time the plaintiff bought the ranch; I was on the district below when we cut that piece of land off, it belongs to district 6,—I was working there at that time. The land may be on the outside there; I don't recall whether there was much land left outside or not, but I think there was. The cut has been made

(Testimony of Charles F. Silva.)

within the last two years through there by the Natomas for navigation, and also to make a cut-off across the bend there. No, I cannot recall any sales of real estate in that vicinity from Nicolaus on down, as far as the Nicolaus Allgier place, where it has been sold for as much as \$125 an acre. I cannot recall any outside of what I done myself. Yes, I know the quarter section, right east of the Garwood place, the southern end of the Garwood place. I recollect something about some Japs buying that place some years ago. I don't know very much about the trade or deal; they got in wrong; that is poor property. As you get out that way, you get into poor land all the time; the further out you go the poorer land you get. The further out you go from the river, the poorer land you get. That is true to a certain extent. I base my conclusion that that land is worth \$250 an acre upon the crops I have cut off of it. I have handled that piece of property. [258] I never handled any of the other. I cut hay and ranched that for two or three years. I have had cattle on it. I have handled it a great deal myself. There was no alfalfa on the ranch when I cut it, it was all volunteer barley and pea-vine, and the regular wild hay mostly. About three tons to the acre I think we measured for one year from one cutting. I never knew of any land lying outside of the old levee on the Nicolaus Allgier place to be used for any purpose whatever since the flood of 1892. It has only been used for cutting wood for use on the ranch. The reason that that land outside the levee was not used was because people had

(Testimony of Charles F. Silva.)

too much land, and they didn't care to take it up. People have too much land, they don't figure that outside of the levee at all. The land outside the levee is all in timber, and it would cost a good deal to take the timber out. It would not be an impractical proposition commercially to remove that timber. Anybody who has the money can take that timber out. The trouble is that the people, they have not the money to clear up that land. They have all got too much land. At the time I offered to buy this land from Miss Garwood, I had not been in the market for land very long. I had bonded property that I owned along on the other side of the levee, and I was looking around for some other land. I wanted to get land any place where it was good; I bought in other places. I did not investigate the land values around there; I knew the land around there. I don't bother about asking anybody about land. I knew Mr. Saylor had moved in there only a year or two before Miss Garwood moved in, and he was stuck too. He paid too much. When he paid \$100 an acre for that land; it was too much, because it is not the land he thought he was buying. The land is not as good. Because it isn't. That land has adobe in it, and does not produce the crops that other lands will produce. That land along in there is not as good as the Nicolaus ranch. Yes, I say that when he paid \$100 an acre for that 128 acres, he paid [259] too much. He didn't get no river front, or water, or anything else. There is very little subirrigation on the Saylor place. There is subirrigation in all that country, if the

(Testimony of Charles F. Silva.)

waters are very high in the river. In some years the subirrigation will go all the way back, that is a detriment there in that country. If there is subirrigation and no ditches to take it off, it is a detriment. That is what is the matter with the Saylor place now, there are no ditches. The Garwood place has lots of sloughs. Yes, subirrigation is a detriment at certain times of the year. In the spring of the year, if the water comes to the top of the surface of the ground, it will kill everything that is on it. If it has ditches to carry it away, it makes the land valuable. If it has not, it kills all the crops off. I would know where the sloughs are on the Garwood place, if I was on the ranch. You can see them on the map, plenty of them, maps sometime don't tell the truth. As I said, if the waters are very high in the river subirrigation goes all the way back and stays; if it is not, you don't get any; it is according to the water that is in the river. Yes, subirrigation goes back sometimes 2 miles. Sometimes it don't go at all; it is according to the stage of the water in the river. If the water is very high in the river, it will go back for a long ways. The places along the river are all alike, one is just the same as another. On the Garwood place, if the water is high, the subirrigation will go back all the way, and if it is not, it won't. If the water is high, it will come back a couple of miles. The Feather River varies considerably; sometimes she is up to 22 or 23 feet, and then she drops to 8 or 10, or whatever it may be. The water can't go back at all if it is lower than the surface of the ground,—I mean the water in the

(Testimony of Charles F. Silva.)

river. If the water is low, there is no subirrigation. It is not true that there is always [260] subirrigation along there for the alfalfa fields. You understand what you call subirrigation, do you—the water must show; there may be water in the ground 6, 10, 12 or 15 feet; alfalfa roots will go 20 feet in depth; now, if you know what subirrigation is, I will answer that question if you will just give it to me right, I will answer it any way you want me to. Subirrigation is when the water comes up within a certain distance of the surface of the land, 2 or 3 feet; if it goes beyond that the subirrigation don't amount to much. If the subirrigation comes on top of your land, which it does a good many times, it will kill your crop, whether it is alfalfa, whether it is corn or whether it is barley. If it comes to the top of the ground when the weather is warm, it will kill every crop you have. Yes, one of the troubles of that country up there is that there is too much subirrigation at times.

Q. That land in this country here close to the levee, there would be too much subirrigation there, wouldn't there? A. Yes, but there are ditches to carry that off. Q. How about this land out here? A. That is not subirrigated, that is running water. Since this levee is up there it would be, but there is nothing there. If that was cleared off and the old levee was gone away and a ditch put through it to carry the subirrigation off it is just as good land as lays out there. Q. And you say that this part is next adjoining the river; you say there would be excessive subirrigation out here on the inside of the levee, but not excessive

(Testimony of Charles F. Silva.)

subirrigation next to the river? A. That is, you must understand me, before the levee was up. Q. I am speaking of before the levee was up? A. There is no subirrigation there because the water run over the top of that land in high water. Q. That is, outside of the old levee? A. Yes. [261]

I was in the market to buy land wherever I could buy it the cheapest. I figured there was 600 acres in the property. That is what we always contended was in that ranch, all through, outside the levee and everywhere; it runs down to the point where it has been cut out. I am thoroughly acquainted with the ranch. I knew what I was talking about. I bought property afterwards. No, I don't know anything about what the Japs paid for their land. No, I don't recall any land that sold for \$250 an acre around there. I paid \$255 an acre around Sacramento for 262 acres, right below Sacramento, about 4 miles below Sacramento, in what we call the Pocket District. I paid \$255 an acre for 262 acres. It was good subirrigated land.

Mr. HEWITT.—If your Honor please, I now offer in evidence a certified copy of the judgment-roll in the case of Isabelle Garwood, plaintiff, vs. Joseph Scheiber and Frances Scheiber, his wife, Morris Scheiber and Emma Scheiber, his wife, John Scheiber and Anna Scheiber, his wife, and the Pacific Mutual Life Insurance Company of California, a corporation, from the records of the Superior Court of the county of Sutter, State of California, together with all endorsements on the several papers constituting the judgment-roll in that case.

(Testimony of Charles F. Silva.)

Mr. MACOMBER.—This record of the State court you now wish to put in evidence in order to sustain your defense that the state action is a bar to this action.

Mr. HEWITT.—That is the object of it.

Mr. MACOMBER.—We object to this, if your Honor please, on the ground it is immaterial, irrelevant and incompetent, inasmuch as that defense stated in the answer of the defendant is no defense to this action. This case is an action for fraud and deceit in the sale of real property, and previous to the filing of this suit she filed a suit in the state court which prayed for both [262] damages and for rescission. The complaint in that case was framed upon the theory of damages and rescission.

The COURT.—It will be admitted subject to your objection.

Mr. MACOMBER.—That is satisfactory.

(The document was marked Defendant's Exhibit "F.")

Mr. HEWITT.—We now offer in evidence a certified copy of the judgment-roll in the case of Isabelle Garwood vs. L. M. Curtis, C. H. Bryan, L. C. Bostwick, and others, a record of the Superior Court of the county of Sutter, State of California, together with all endorsements on the several papers constituting the judgment-roll, it being an action of plaintiff to correct and quiet the title to the property which she purchased of the defendants in this action.

The COURT.—Who are the parties defendant?

Mr. HEWITT.—There are about 40 or 50 of them,

(Testimony of Charles F. Silva.)

I should judge, if the Court please. It was a proceeding brought under sections 749, 750 and 751 of our code, and the object of introducing it is for two purposes; first, the contract entered into between plaintiff and defendants provide that if there are any defects in the title that they will be rectified, if your Honor please, to the extent of \$250 expenses toward carrying it out; the second is that the complaint in this action is a verified complaint, verified by plaintiff herself, and shows the land which she says under her own verification she is the owner of; that is, it gives a description of it.

Mr. MACOMBER.—Now, if your Honor please, we object to this upon the ground it is immaterial, irrelevant and incompetent, and has nothing to do with this case.

The COURT.—It may be received in evidence.

Mr. MACOMBER.—We note an exception.

#### EXCEPTION No. 5. [263]

Mr. HEWITT.—I now offer in evidence a certified copy of the warrant issued by Reclamation District No. 1001, bearing date December 30, 1911, for the sum of \$5,106.43, together with all endorsements on the warrant in question, the warrant being endorsed, "Pay to the order of Isabelle Garwood, levee district No. 6, by J. J. McNamara, Chairman, Julius Rolfe, Clerk," also endorsed "Isabelle Garwood"; also endorsed a second time "Isabelle Garwood" and "C. E. Williams."

Mr. MACOMBER.—We object to this being introduced in evidence upon the ground it is immaterial,

(Testimony of Charles F. Silva.)

irrelevant and incompetent, and has nothing whatever to do with this case; but we will stipulate that it be admitted in evidence if counsel be fair on his part and stipulate that he has nothing to do with the purchase price the defendant received, the \$75,000, and the plaintiff has been assessed subsequent to that time \$26,000, to keep the land free from overflow, and this amounts merely to a reduction, making the assessment \$21,000—if counsel will stipulate to that, I will withdraw my objection.

Mr. HEWITT.—We will make no stipulation to that effect because of the very nature of the assessment.

The COURT.—The objection is overruled, and it may be received.

(The document is marked Defendant's Exhibit "H".)

Mr. MACOMBER.—We note an exception.

EXCEPTION NO. 6. [264]

**Testimony of Edward Von Geldern, for Defendants.**

EDWARD VON GELDERN, called for the defendants, testified as follows:

I reside in Yuba City. I am a civil engineer by occupation. (Counsel for plaintiff admits that the witness is qualified to testify as an expert in civil engineering and surveying.) I surveyed the Scheiber ranch July 12th of this year. I knew the original boundaries of that ranch from previous surveys that I have made in that territory, but I based the work of this survey on the description furnished from the suit to quiet title, and followed out the description on

(Testimony of Edward Von Geldern.)

the ground, and found it to coincide with the lines as I knew them to be. The lines were exactly as pointed out by the Scheiber Brothers. I wish to correct my statement, as to knowing about one particular line in the bottom line, I was not familiar with that one line, but that holds good as far as the others are concerned; all these lines were also shown me by the Scheiber Brothers, and Mr. Zimmerman. I don't know where Mr. Zimmerman resided, but I think he lives in that locality somewhere. I know that he has lived there some years ago. Yes, I made a map of my survey. Yes, the map, which you show me is a correct map of the place, as surveyed by me. (At this point the said map is introduced in evidence, and marked Defendants' Exhibit "I.") When I was there surveying, I took elevations of the land between the two levees, the old levee and the new levee, so-called I took elevations of the land between the new cut of the Feather River and the old Feather River channel. In seeking those elevations, I did not use any regular datum. In order to facilitate matters I assumed the datum and made everything in direct comparison to that datum. I used the elevation of the water in the river at that time as the base of starting point of that assumption. At that date, the water in the river was not at [265] its lowest stage, it was about three feet above the water-mark at that time. I found the land close to the cut, or that portion of the land between the two levees close to the cut to be about 14 feet higher than the water in the river. I just gave you the elevation, the difference between them. The elevation of the

(Testimony of Edward Von Geldern.)

old channel, the difference in elevation between the bed of the old channel and the river was 12 feet; it averaged 12 feet pretty well all over the channel. It was 12 feet higher than the stage of the water at that time. I found 609.9 acres within the boundaries of the entire tract.

Cross-examination.

Mr. MACOMBER.—Q. Mr. Von Geldern, I understand you commenced your survey down at this corner, did you—you got this section corner? A. Yes. Q. And then you proceeded north to this point? A. Yes. Q. And then back and around? A. Yes. Q. Now, how many acres did you find—follow me around this way, right around down the line of the old levee, following the meanderings of the old levee, back along the road there, and then down here, taking in the quarter-section back to your starting point—was that it? A. My survey was computed, was completely computed for the whole thing, although I have made a kind of rough estimate, but I would not vouch for it absolutely being correct.

Q. You won't say how many acres there were in this? A. Just approximately.

Q. Approximately how many? I will withdraw that question. You say you surveyed the line, the original line going out here? A. Yes.

Q. Where did you get that description, that is this description of this territory out here? A. That was the description that the [266] suit to quiet title was based on. That was furnished by Mr. Hewitt.

Q. You surveyed the portion of the ranch lying

(Testimony of Edward Von Geldern.)

west and north of the river upon the description given you by Mr. Hewitt? A. That, and also I might say that the description that was furnished me around that river was the original description of the ranch—that is, that line coincides exactly, or very nearly exactly with the original Government meanderings of the river.

### Redirect Examination.

Yes, I made a map showing the ownership of the land adjoining and about the Scheiber ranch. Yes, the map which you show me is the one I made. (The map was introduced in evidence, and marked Defendant's Exhibit "J," also an abstract of title to the property was introduced and admitted in evidence, marked Defendants' Exhibit "K.")

### Testimony of G. A. Wessing, for Defendants.

G. A. WESSING, recalled for the defendants, testified as follows:

I reside at Nicolaus, Sutter County. I have lived there 26 years. I came there in the fall of '88. I am a farmer at the present time. I have been in the merchandise business. I own land in the vicinity of Nicolaus. I have bought and sold land in that vicinity. I know the ranch now owned by Miss Garwood. I have known that place since my time in Nicolaus. I am a trustee of Reclamation District 1001. I have known real property being bought and sold in the vicinity of Nicolaus. From 1906 to 1911, in Sutter County, real property value stood about the same. Property ran along pretty evenly that time—

(Testimony of G. A. Wessing.)

property from about 1906 to 1911 was selling well. Yes, I know the value of the Scheiber property, or the Garwood property in 1911.

Q. Taking the ranch as it stood there as a whole at that time, [267] what was its valuation?

Mr. MACOMBER.—Now, one moment, if your Honor please, in order to save time, it will be understood that my objection made yesterday to the value of the ranch in its entirety or the value of the portion not described in the complaint will run to all these questions?

The COURT.—Yes.

Mr. MACOMBER.—Subject to the same ruling?

The COURT.—Yes.

Mr. MACOMBER.—I note an exception.

(EXCEPTION NO. 7.)

A. About \$80,000.

Mr. HEWITT.—What is its market value at the present time?

A. That ranch is worth \$100,000.

The levee that protects the property from the overflow of the Feather River commences at the foothills near Sheridan and runs down to the Bear River until it intersects the Feather, and down the Feather River to the Sacramento about 14 miles. There was a levee in existence in 1911—they were working in 1911—the reclamation district had been formed, just started in. There had been a levee there all my time. The new levee was completed in 1912 or 1913. Yes, I raised some alfalfa. My ranch is about one-half

(Testimony of G. A. Wessing.)

miles from the edge of the Garwood ranch. I have 850 acres of river land. My ranch has been run as a stock ranch, and has been pastured. I have got at the present time about 20 acres in alfalfa, on the front, what you call the front land. Before the reclamation, the back land of my place was subject to overflow, and it ran into wild grass; the front land, it was rented to a cattle-man, and last year he just pastured it and tramped it out, and we are plowing it and putting in grain; in another year we will put in alfalfa. At the north and east of the Garwood property, there is a slough,—it is to the southward, it is not Ping's slough; it is that water that comes in above Nicolaus, just at Nicolaus there. To the eastward [268] of the Garwood property, that is all first-class good land, extending away over to the east line is farming land, more over to the canal. That is grain land, or fruit land, you might call it. Yes, the district had considerable experience in condemnation suits. That was about  $4\frac{1}{2}$  miles to the east. The land along the canal is adobe land. The Scheiber property is better. That land will not grow alfalfa out there without irrigation, and the Scheiber property will grow alfalfa without irrigation. There were about 8 condemnation suits brought up there by the district. I think there was 12 or 15. On an average there was \$100 to \$150 an acre allowed for the land taken. Yes, the term, sub-irrigation, has a well-defined meaning in that locality. Subirrigation is improved by cultivation; it is the water going under, and it will seep up, be drawn

(Testimony of G. A. Wessing.)

up—you cultivate the surface, and you will bring the moisture up, where as if you let the surface lie dormant it will dry up, and it will seal and you do not get the subirrigation that you would if the land is worked—it will draw up. There are some orchards in that locality in Sutter County being planted. There are some orchards in cultivation in Sutter County north of this place. Yuba City is an orchard country—it is all orchard. Absolutely, they depend upon subirrigation for the cultivation of peaches and different kinds of fruit there. At Yuba City they have orchards back there for five miles. The condition, as far as subirrigation is concerned, is similar in the vicinity of Nicolaus to what it is in Yuba City. The property owned by Miss Garwood has always been looked upon as one of the best ranches. The place has generally been called the Nicolaus Allgier place. I have been over that land. Referring to the scrip, or warrant, of Reclamation District 1001, in the sum of \$5,000, it is in evidence here. At the time they built the new levee, in order to pay for [269] the old levee, they allowed all land owners on a pro rata of about \$5,000 a mile, and each were paid according to the former years' assessments and valuation; they figured it on that basis; whatever the property was assessed for, they paid them at that rate for their levee. That warrant would represent the old levee across the Scheiber ranch, the valuation as fixed. That would represent their portion of the levee. The original plan of reclamation contemplated enlarging the old levee;

(Testimony of G. A. Wessing.)

the original plan followed the old levee. They decided later to take the river course, and they then bought a right of way along the river, along facing the river bank. They bought their right of way from Miss Garwood, and the property owners. They paid \$25 an acre for the land that they actually used along the river bank for the levee. I don't know how many acres they purchased from Miss Garwood, I was not a director at that time, and, of course, I am not familiar with just the amount. I could not say just what it would be; I know they paid for what they actually used. The effect of the change in the levee put this land between the old levee, and the new levee, in a protected position.

#### Cross-examination.

When they changed their idea, instead of following the old levee, they decided to come right straight down the river channel. That had the effect of reclaiming some land in each one of the ranches along in there, so that now, the land which lies between the two levees on the Garwood place, some 57 acres, or 60 odd acres, between the two levees, is now reclaimed land. Yes, I know what the condition of that land was before the new levee was constructed there. It was river land; it was swamp land, it was never used for agricultural purposes, no. It was not used for agricultural purposes because it was subject to overflow whenever the river came up. [270] For that reason it would not be practicable to use it; and, therefore, it was never used. The same would hold of any land lying north and northwesterly of the old

(Testimony of G. A. Wessing.)

levee. Yes, I remember when the levee broke in the year 1892. The old levee came down following the meanderings of the old levee, as it is delineated on the Garwood place, and proceeded on to what is known as the Nelson Bend, in a northwesterly direction. When the levee broke in 1892, instead of reconstructing the levee as it was there then, they built it right straight down in a southwesterly direction, instead of a northwesterly direction, as it had gone before, when following the line of the old channel. In 1893 they shot the levee straight down in a southwesterly direction. Yes, after that, this land, this portion of the Nicolaus Allgier place, was abandoned to the river, as well also as a portion of the Claus Peters place, and all the places in there at Nelson Bend. After that year, until the present day, during the 24 years that have elapsed, that land has never been used for anything. It would be impossible to use it for any agricultural purposes. The tule is down further from the Garwood place, down at the bottom of the basin, around the big wide canal, that is tule. When the Bear River would overflow from breaks, the land down in the tules would fill up with water. When the water in the tule would get high, it would come up and overflow these lands. That canal on the east side of the Nicolaus Allgier place, about three miles to the east, was built to collect these waters coming down from the foothills; to pick up these streams, like Auburn Ravine, and the other foothill streams, and swerve the water off into the cross-canal between the two districts, 1001 and 1002.

(Testimony of G. A. Wessing.)

Then there is a pumping-station situated down near the Feather River at the junction of the cross-canal and Feather River, which pumps the water flowing [271] into the basin into the river. This reclamation work was done since 1911. To pay for all the work of protecting this back land, there was an assessment put on all these lands. The assessment ranged from \$16 and a fraction an acre up to \$25 an acre. They had to raise in the first place about \$850,000. That was the first assessment. The second assessment was to raise \$500,000 more. There will be a general expense account from year to year.

Q. Now, then, as I understand it, the purpose of this reclamation work was to protect this land all in here, that is, from one-half to three-quarters of a mile from the river down in a southeasterly direction from overflow; what I mean is this: This cross-canal work did not give any particular benefit to the lands up close to the levee, that land was higher up, wasn't it? A. Yes. Q. In other words, for instance, on

the Nicolaus Allgier place, commencing with contour line 32, about half-way on the ranch, where the ranch bends, from there up to the levee, that land is higher, isn't it? A. Yes. Q. And therefore that

land would not be benefited by this cross-canal? A. Not so much, but you have got to pick that water up or the water back on the tules will back up.

Q. Previous to the time this reclamation work was done, this back land on the Garwood place, as well as these rear lands down here, were subject to overflow? A. All subject to overflow. Q. Subject to

(Testimony of G. A. Wessing.)

overflow, and it was not practicable to farm them?

The COURT.—What land are you referring to?

Mr. MACOMBER.—I am inquiring about the Garwood place, as well as all these places along here.

Isn't that true? A. The back land was subject to strong overflows and the tules full of water and the reclamation work kept the tule water out. Q. That was the purpose of building this cross-canal—the expense [272] of making this cross-canal was to protect these back lands in all this place from the overflow, from the tules, isn't that true? A. Yes.

The COURT.—What part of the Garwood ranch was back land?

A. There was about 60 acres in the ranch back; a part of it would overflow when the tules were full of water and the water would come up; it would not come over all; it was not tule land, but it was and that when the American River was high and the south wind blew it would bring it up. The land two or three miles east of the Garwood place is not alfalfa land; it has no subirrigation. I did not say that up at Yuba City, five or six miles from the river, they had subirrigation; I said that about five miles out they had orchards there, and that they had cultivation and they had subirrigation; but this is on higher ground back; it is toward the foothills more than that land. The subirrigation would not go through bedrock, or anything like that; it would not go through clay; it percolates through alluvial sediment, but not through clay. Yes, I say that I think that ranch is worth in its entirety \$100,000 now. I think that it is worth \$20,000

(Testimony of G. A. Wessing.)

more now than at the time she bought it, because the reclamation has improved all the property. Since the reclamation is in there, people are going ahead in our locality and planting orchards, and they are protected; but if you were all open and no levees back of you, the floods would sweep over it. The back waters would come up. Yes, now, that the back lands are protected from overflow, the value of the land is enhanced. We have good flood levees. Yes, sir, land values ran along about the same from about 1906 to the year 1911; the land stood pretty steady. From 1899 and 1900 up to 1911 and 1912 the values ran along pretty steady, about the same. There was not much change. Yes, I know of some sales that have taken place in that vicinity in the [273] last 10 years: Adam Kreig bought the Drescher ranch—there were 55 acres, right up against the levee; it was choice fruit land. That land is midway between the Garwood place and the town of Nicolaus. He paid \$200 an acre. He paid about that for the ranch, and then he got personal property; he paid extra, \$200 an acre is what they considered the ranch at that time. He paid \$10,000, a little more, for the ranch, and then he got personal property that he paid for; it was invoiced separately. There was an old house on the place; he has fixed it over since; he built the barn; it is a small barn; the improvements do not amount to much. The nearer you come to the town of Nicolaus the nearer you are to the railroad. I don't know that land closer to town is any better, that there land is all the same; it is all

(Testimony of G. A. Wessing.)

the same kind of land. The Valley place lies about one-half mile north of the Garwood place. That land was sold for about \$180 or \$200 an acre. I don't know what Meiss did sell for. I don't know that it was \$100 an acre; I know that Meiss sold to—I don't know just what they did pay for that. Yes, that place was put up at auction by the Probate Court just a year before Miss Garwood bought the Scheiber place. I was the highest bidder at that sale. I bid it in at about \$69 or \$70 an acre. Q. There was no one bid any higher for that place, was there? A. At that time it was surrounded with a bad levee there. People didn't want to take hold of it right there; the river—that is what scared them out. Yes, I was the highest bidder then for that land, and the highest I bid was \$69 an acre. I do not know that the highest estimate, when the matter was heard in court, was \$135 an acre. I did not go there at that time. I do not remember saying to Mr. Greider that I would be very glad to let this land go for less than \$135 an acre. I don't know what the Valley place was sold for. I [274] know it was traded through different people so much that they got disinterested and invested in other people's land.

Q. Now, as a matter of fact, you know that there is no land in that neighborhood at any time within the memory of man, or within your recollection, that was sold for \$250 an acre; isn't that a fact? A. There is land there that I have known people to refuse that for it. Q. Where was that? A. Borgman's ranch.

(Testimony of G. A. Wessing.)

Q. Now, Mr. Wessing, don't you know as a matter of fact that Borgman's place is greatly improved, that this man Borgman came out from Wisconsin a few years ago and put in a lot of irrigation devices on that land A. He came on without any devices and paid \$131 an acre. I did not see the money pass, but I met Mr. Borgman at the train and brought him there with his family when he came to town. There are about 40 acres on that ranch. Yes, I own this land on the Feather River delineated on this as being approximately south of the Anderson ranch. I bought 850 acres; I have a half interest in it.

Q. Now, Mr. Wessing, you own this land on the Feather River delineated on this map as being approximately south of the Anderson ranch, do you not? A. Yes.

Q. How many acres did you buy? A. 850; I have a half interest in it.

Q. You bought that 850 acres for \$26,000; isn't that the idea? A. Thereabouts.

Q. \$26,000 for 850 acres? A. No, that is a half interest in it; I got a half interest in it.

Q. As a matter of fact, did not the whole 850 acres sell for \$26,000? A. Gilmore bought that at, I believe, something like that.

Q. Gilmore bought it for \$26,000? A. I think so, about that.

Q. And then he sold you a half interest in it?

A. Yes. [275]

Q. Now, then, Mr. Wessing, when did Gilmore buy it?

(Testimony of G. A. Wessing.)

A. Gilmore bought it, I think, in 1911 or 1912.

Q. In 1911 or 1912—about the time the Nicolaus Allgier place was sold to the plaintiff here. Your ranch is a little over half a mile from the south corner of the Garwood place?

A. Yes, it is about half a mile. Right below my place is the McNamara land. Judge Shields' place is below McNamara's. Shields paid \$70 an acre for his place, I believe. All I know is hearsay as to these properties. Judge Shields bought it in 1911 or 1912; I don't remember which. Saylor bought his place in 1909 or 1910. There are about 128 or 130 acres to the Saylor place. The Saylor place, as compared to the Nicolaus Allgier place is about the same land; it is about the same thing. As far as the subirrigation is concerned, it is about the same character. Now, in respect to the Redfield farm, that runs about the same as the Scheiber place, too. In respect to soil and subirrigation, and so forth, it runs about the same. It is about the same quality. The front end of the Redfield farm is better than some of the land further back. The front is the best land. The front land of the Garwood place is more valuable than the back land. We value all of the front land more than the back land. I don't know that Dave Redfield sold that ranch to the Scheiber Brothers for \$5,000. They sold the ranch, and I believe he held out about 12 acres of his ranch. I don't know that Dave Redfield sold that Redfield farm right northeast of the Nicolaus Allgier place to the Scheiber Brothers for \$5,000; it was more than

(Testimony of G. A. Wessing.)

that. I was under the impression that he got somewhere about \$14,000 or \$15,000 for that piece of property. There was some personal property with it. There is about 108 acres to that piece, not counting what is outside of the levee. There were some horses and cattle; I don't know to what extent, exactly. [276] As to where I got the information to the effect that that property was selling for \$14,000, well, it was talked about by the people at that time; I would not be positive in regard to that, but the time Saylor bought his ranch—in regard to the sales made, you always hear of those things. Saylor paid \$18,000 for the ranch, and some stock; there were about 128 or 130 acres. I know that he paid \$18,000 for the ranch, and the stock on it. I do not know that the selling price of the ranch was \$100 an acre. I know he bought it as a whole. There was 180 acres of land just east of the Garwood place belonging to John Swall, which was sold to some Japs for \$85 an acre. Then after paying a part of the purchase price, they defaulted on the balance, and let the land revert to the sellers. In respect to the offer of \$250 an acre for the Borgman place, I will say that Mr. Borgman told me himself at the time that he had refused \$17,000 for his place. There was some little stock, I don't know how much.

Redirect Examination.

The Drescher ranch, that was sold to Adam Kreig, was all alfalfa land—absolutely, every foot of it. At the back end of that ranch there was some slough and low land, but with proper drainage that is all

(Testimony of G. A. Wessing.)

alfalfa land in there. The Borgman land, I think, was purchased in 1909 or 1910—I think in 1909. The 800-acre ranch that I spoke of, was the Miller place; 600 acres of that place was in the tules. The McNamara place, all the land south of the slough there we consider tule. The Redfield ranch was purchased by the Scheiber Brothers in 1908 or 1909. Some of the land purchased by the Scheiber Brothers lies outside of the old levee. There is 20 acres outside, I should judge. That land outside of the old levee on that place is similar to the land outside [277] of the levee on the Garwood place. The land sold to the Japs for \$85 an acre was not tule land, it was adobe land. It is towards Strickland Station I base my opinion that the Garwood place is now worth \$100,000 upon the fact that it has got a great quantity of alfalfa land, and it will all grow alfalfa; it is all alfalfa land; it will grow it; the land that I value as the best land is in front, and that will raise 5 or 6 crops without irrigation, properly cultivated; the land in the back will raise at least 3 without irrigation; and land of that class you cannot buy it anywhere; the people that have got it don't let loose of it at any price; they will sell it, but at a very exorbitant price. There are at least 150 acres of first-class alfalfa land—the front land; then there is a middle line of about 150, then there is 160 that are further back, that will raise 3 crops of alfalfa without irrigation. The Scheiber Brothers bought their land in 1909, or thereabouts. They bought it years before that on contract. I don't know what the terms of

(Testimony of G. A. Wessing.)

purchase were by which the Scheiber Brothers bought the Nicolaus Allgier place; I know they rented the place to start in with, and then afterwards they made a term purchase.

**Testimony of Benjamin Drescher, for Defendants.**

BENJAMIN DRESCHER, called for the defendants, testified as follows:

My name is Benjamin Drescher. I reside in Nicolaus. I know the land that the Scheiber Brothers, defendants here, sold to the plaintiff. I have known it all my life, 40 years. I have resided in that neighborhood some 41 years. I own land in that vicinity, and I did in 1911. I am quite familiar with the Scheiber Brothers' ranch, the ranch in dispute. I am well acquainted with it. I [278] have been all over it; both back and front, and around and along the river. It is a fertile piece of land; I have not bought or sold land in that vicinity. I know of some land being bought and sold there. I never farmed the Garwood ranch myself. Q. Do you know the value of that Scheiber Brothers' ranch on the 1st of November, 1911? A. Well, I place a value of about \$80,000. Q. At that time it was worth \$80,000? A. Yes. In placing that valuation I took into consideration its condition and situation at that time; its productive qualities and so forth. I think it would have sold for that, allowing a reasonable time to find a purchaser. The reclamation that has been done since that time will improve the value of the place in proportion to the cost of reclamation.

(Testimony of Benjamin Drescher.)

Cross-examination

The properties are improved in proportion to the reclamation work because they will be safer; the land is safer from overflow and floods now than it ever was. One reason why—the cross-canal was built to keep the water back from the tules, it is a drainage canal for the water from the plains, to keep the water off the land in the lower part of the district. The Garwood place was never flooded every year, anyway. Of course, the whole district has been flooded at times, but not every year. Sometimes it would be flooded for considerable periods of time. I do not know what Saylor paid for his place. I do not know what the Scheiber Brothers paid Dave Redfield for his place. I do not know what the Redfield place was sold for. I have never heard. I don't know anything about the sale of the land adjoining the Garwood place on the east to the Japanese. Some of the Valley place sold for \$150 an acre, some of it was sold for \$100 an acre. I was heir to some of that land, and I got \$160 an acre. About half of the ranch was sold [279] for \$100 an acre. Some of the heirs sold for that. Yes, some of the land running from the river bank was sold for \$100 an acre. Yes, the value of the land in the last ten years ran pretty steady up there. The values seemed to be increasing right along; I could not say how much. I think subirrigation extends beyond any part of the Garwood ranch. Yes, I understand what subirrigation means. I have had experience with subirrigation. I know where the sub-

(Testimony of Benjamin Drescher.)

irrigation runs along that place from Nicolaus down south along the river. I would say that the Garwood place is all subirrigated. Of course there is a difference in the composition of the land; the ranch is not all of the same material. The land on the Garwood place which lies outside of the old levee is clay and sandy soil. In the year 1911 the new levee was not in existence. At that time all portions of the land outside of the levee were abandoned to the river. That particular portion of the Garwood ranch was never used for anything at all, only for wood. The best land on the Garwood ranch I figure at \$220 an acre. I don't know how many acres there are in the ranch. I place it in three grades—front land, middle land, and back land. I figure the middle land at \$180 an acre; I figure the back land at \$140 an acre. I would say that in 1911 this back land was worth \$140 an acre. No, I cannot call your attention to any land that is not subirrigated that sold in that neighborhood for \$140 an acre; only I have heard from hearsay that the land east of Nicolaus Station has sold for \$135 an acre—adobe land, a 40-acre tract. I have heard that. I do not know what was paid for Judge Shield's land. I cannot call your attention to any land around there that sold for \$250 an acre, but my brother sold 55 acres for \$12,000, right about half a mile below Nicolaus, that was the Drescher place. It is right above the Redfield place. This land was 55 acres for \$12,000. There was a house and a barn, [280] that is about all the improvements—a 6-room house. I believe

(Testimony of Benjamin Drescher.)

it was sold in 1910 or 1911. No, I did not see the money pass; I merely know what was told me.

**Redirect Examination.**

Yes, my valuation of this Scheiber Brothers' or Garwood property, is based on what I know of the land, and its productive qualities, and its condition, and the value of it at the time.

**Testimony of John Borgman, for Defendants.**

JOHN BORGMAN, called for the defendants, testified as follows:

I reside in Nicolaus, in Sutter County, California. I have lived there 10 years in May. I am a land owner in the vicinity, and have been for 10 years. I bought the land myself direct from a real estate man. There are 42 acres to my ranch. As to how my land compares with the Scheiber ranch, it is average land, as the Scheiber ranch; the Scheiber ranch has got some better, and some probably not as good. I paid \$5,500 for my place. There are 42 acres. I know the Scheiber property. I have known it as long as I am there. I was acquainted with values of property in that vicinity in 1911. Q. What was the value of the Scheiber property as a whole in September or October, 1911? A. Well, according to other sales and according to the value of that land it should have been worth seventy-five thousand to \$80,000 as a whole. Yes, I am acquainted with the term sub-irrigation. In reference to the Scheiber ranch, my ranch is located about west from the Scheiber ranch; north of me is the Saylor ranch; east of me is the

(Testimony of John Borgman.)

Swall property. There is about 120 to 140 acres of the Scheiber land that is about the same quality as my land. The better quality is near the river. There is about 135 to 140 acres of the best quality. That 120 or 140 acres is better than my land. The second-class is about the same quality as my [281] land; I had it of the same value. I mean there are three classes of lands. I was assessor in that district No. 6 before this new reclamation was formed, and I had it in three classes of land around there. I base my opinion that that land was worth from \$75,000 to \$85,000 in 1911 according to the sales that had been made just before and just after that sale. I was familiar with its productive qualities. Productive qualities had something to do with fixing my valuation of the land. The 160 acres that is in the quarter section is not as good land as mine, not quite, no.

#### Cross-examination.

I could not say positively how many acres there is in the ranch. I could not state anything what there is in it, only by hearsay. I did not make any surveys of it. I figure 135 acres of the Garwood place to be first-class land, that is up near the levee. As you go back it is not so good; that is because you cannot raise the amount of crops on it, of alfalfa. The further it goes off from the river, it gradually loses some of the subirrigation, gradually. There are in the neighborhood of 120 acres in the second-class. I value the first-class land at \$250 an acre. I value the second-class land at \$200 an acre; I value the third-

(Testimony of John Borgman.)

class land at \$100 an acre. There might be 160 acres in the third class; that is the lower part of the place. Yes, I value that \$100 an acre. That land is not so valuable, because it lays farther off from the river; there is not much subirrigation. Yes, I have stopped to think how much that would total up. That would total up between \$75,000 and \$80,000, except giving some of the land outside of the levees some value; that don't come in the figure. Yes, I have my place pretty well improved with pipes underneath. Yes, I have my land checked. Yes, I have a well on my place, and I have [282] a very scientific system of irrigating — in that way I raise alfalfa. I have that system of irrigation because I am not satisfied, unless I get the utmost out of my land. The Saylor land is not quite as good as the best land on the Scheiber ranch. No, not quite, I have been watching it, I was assessor at that time. The Scheiber ranch raises 6 crops, and the Saylor ranch 5, and I get 4. The Saylor place is fully as good as the middle grade of the Garwood place. I take it according to the way I assessed it, and they always were satisfied with the assessments I made. I put the Garwood ranch at that time at \$150 an acre, and the Saylor ranch at \$120 and mine at \$108; the second-class of the Scheiber ranch at \$108. Yes, I say that the Saylor place has a value as good as the second grade on the Garwood place. I am not basing my valuations in fact upon the sales that have taken place in the last year; the productivity of the soil. I have been in that neighborhood since 1905.

(Testimony of John Borgman.)

There has been some alfalfa grown on that quarter section of the Scheiber place to the east of my place during the last two years. I could not tell how much; that is since the reclamation work has been in. No, there never was any alfalfa before the reclamation. Yes, the farmers do plant alfalfa on the back lands out of the subirrigation area. On the Swall place they had a reclamation levee all the way along the ranch, they were protecting it from the back waters. They had a reclamation levee all the way around it. The Swall place is east of the lower part of the Garwood place, that place is entirely surrounded by levee, and so protected from the water from the tules. Without that levee it would be partly subject to overflow. During my time that land outside of the old levee has never been used for any purpose; it was partly kept for the timber. It was not protected from overflow. It was covered with overflow a large portion of the time, that is at the wet season. The lowest grade of land of the Garwood place would [283] raise at least three tons of alfalfa to the season. A part of it is planted in alfalfa now, that was seeded two years ago, and a year ago last winter we had back water covering that, and it did not take the sand away, for young alfalfa left there, there is a good stand this year—this year we did not get any back water. The reclamation system was built, and no back water came any more, and we have a good stand on the upper part. The lower part could be put in alfalfa and raise as good a crop as that. The middle-class

(Testimony of John Borgman.)

land on the Garwood place would produce 4 to 5 tons of alfalfa without irrigation. The rear portion would produce 3 tons without irrigation; with irrigation you could do all of it, just as good as the front land. We have not got that heavy clay soil, what you call a heavy clay soil; we have a mixture of sediment through that soil. The way it is plowed up, it is a very fine soil; I did not dig down into that, but I dug down into my own, and mine is all the same. My land is about half a mile east of the Garwood place; there is just a quarter of a mile between us. The best land of the Garwood place will produce from 7 to 8 tons of alfalfa to the acre per year in 6 crops. The average price on the ranch for alfalfa loose is \$7 per ton. I never found that there was any difference in market value between irrigated alfalfa and other alfalfa. You can't tell the difference. The alfalfa that we grow there with irrigation looks better than some that grows on the highland, subirrigated, it is leafy and as juicy as the first crops in the spring. Yes, I know of land up there that sold as high as \$250 an acre. Right alongside of the Scheiber ranch, one of the Swall brothers bought the other's share out at \$250 an acre 2 years ago. I am sure of that.

Q. Did you see the money pass? A. He has got mortgage on that place for that. I am not any more friendly with the Scheiber brothers than I am with anybody else that treats me fair and right. That is [284] all I want from my neighbors. They have never treated me wrong. The Redfield

(Testimony of John Borgman.)

farm, situated just north of the Garwood land, is about the same quality as the Garwood ranch. Yes, it is about the same quality.

**Testimony of J. B. Thompson, for Defendants.**

J. B. THOMPSON, called for the defendants, testified as follows:

I reside in Nicolaus, Sutter County. Our land is about half a mile from the Scheiber Brothers' property. We had that land in 1911, yes. I have known the Scheiber brothers' ranch since 1882. I am familiar with its productive qualities. I know the character of the soil. I have been on it frequently. I have farmed part of it. Q. Do you know what the market value of that land was in September, October and November, 1911?

A. Well, I have got it in three different pieces of land.

Q. I do not care for the grades of it; I want to know as a whole? A. The whole lot to be worth about \$80,000. Yes, that is what it would sell for at that time, allowing a reasonable time to find a purchaser. There were quite a few buying land around there in 1911. I am a farmer and a dairyman.

**Cross-examination.**

I divided that land into three grades, yes. In the best grade I have included about 150 acres. I figure that to be worth from \$225 to \$250 an acre. The second grade runs from \$160 to \$170 an acre for 150 acres. In the poor grade of land there are 160 acres

(Testimony of J. B. Thompson.)

at \$125 an acre. The first division of the land, that is the good land, commences at the levee and proceeds back from the levee 150 acres. The middle land I figure at 150 acres, then in the quarter section there is 160 acres. The land which is now between the 2 levees, I figure that to be worth \$25 an acre. At the time the plaintiff bought the land, the old levee was there, but the new [285] one was not. There was about 60 acres of the land outside the levee, which I figured to be worth \$25 an acre; the rest of the land outside of the old levee, I would not figure to be of any value at all. No, I did not consider that as being worth anything. The land that now lies between the 2 levees, I figure to be worth \$25 an acre. I farmed what is called the 100-acre field, and the strip running down to where the house and barn used to be. The 100-acre field joins the Redfield farm on one side, and the county road on the other. That is the best portion of the land. I never farmed any other portion, other than a little strip down the levee, where the cut-off is now. The Nicolaus Allgier place is better than any of the Saylor place. I say the 100-acre field is better than the Saylor place. Part of the Saylor place is good land. There is some of the Saylor land covered with sand, but the Saylor place, taken as a whole, would average to be as good as the second grade on the Garwood place. The Redfield farm just at the northeast of the Garwood place runs about the same character as the Garwood place. During the 10 years immediately preceding the sale

(Testimony of J. B. Thompson.)

of the Scheiber place to Miss Garwood, land values ran along pretty good—about the same, without any change. Yes, the values were increasing; since they started the repairing they increased more. After the reclamation was formed and they got the levee up the land is worth a good deal more. The reason the land is worth more now is because this back land is now protected from the water from the tules; that is what the canal was for. The water would be a nuisance for a while first, but they would plow the land after the water would go down and put in a good crop; that is an annual crop like buckwheat.

#### Redirect Examination.

Yes, the building of the levees along the river also increased the value of all the lands in that vicinity.

[286]

#### **Testimony of Arnold Zimmerman, for Defendants.**

ARNOLD ZIMMERMAN, called for the defendants, testified as follows:

I reside at Nicolaus. I have resided there since 1877. I am acquainted with the Scheiber property now owned by Miss Garwood. I am a farmer by occupation. I have known that ranch since '77, but I lived on the next ranch since 1883. I have been a farmer all my life. I am the Zimmerman that pointed out the lines to the surveyor when he was making a survey. I pointed out to him the boundary lines between the land formerly owned by Claus Peters and the Scheiber ranch. I pointed them out to him correctly. I am more or less familiar with

(Testimony of Arnold Zimmerman.)

the value of land and the production of land in the vicinity of Nicolaus, similar to the Scheiber place.

Q. What was the value of the Scheiber ranch as it stood in September, 1911, October, 1911, as a whole?

A. That whole ranch, what I understood it was sold for?

Q. I say what was its value?

The COURT.—Q. State whether you know its value?

Mr. HEWITT.—Q. Do you know what the value was at that time? A. Yes.

Q. What was the value? A. Well, there is a little difference in the land.

Q. Take the ranch as a whole, what was it worth?

A. As a whole?

Q. Yes. A. It is worth more than Miss Garwood paid for it.

Q. How much was it worth? A. How much more?

Q. Yes. A. I don't know; I have not figured it, but I think it is worth five or \$6,000 more.

Q. Than what she paid? A. Yes.

Q. Do you know how much she paid? A. Only by hearsay. [287]

Q. How much have you in mind that she paid?

A. \$75,000.

Q. You think it was worth five or \$6,000 more at that time? A. Yes.

Q. What is it worth at the present time as a whole since reclamation? A. Well, it is worth quite a

(Testimony of Arnold Zimmerman.)

bit more; it has been quite a benefit to part of the ranch.

Q. How much would you say it was worth now?

A. Well, now about \$85,000, something like that.

Q. \$85,000?      A. Yes.

Q. That is as much as you think it would be worth now?      A. Well, I don't know.

Q. I mean, taking it as a whole?

A. Taking the whole ranch as you mean?

Q. What is it worth now since reclamation?

A. Since reclamation—you mean since the reclamation district has been in these?

Q. Yes.      A. I would guess about \$100,000.

#### Cross-examination.

The land is different a little in character. There are at least 450 acres of good land; I don't know exactly either, but I think so. I have not cut that up, or classified it, not particularly, of course, the middle of it is better than some of it. I would not value the land lying between the two levees to be more than \$25 an acre. That land cannot be used, no, there is quite a bit of wood on there yet. I don't know whether I would figure that land between the levees at \$25 an acre for wood. As I say in time that land will be all right.

Q. The land outside of the old levee was not used for any purpose, was it?      A. Was never used?

Q. Yes?      A. No. [288]

Q. That land out there was never used?      A. No.

Q. They could not use it?      A. No.

(Testimony of Arnold Zimmerman.)

Q. Coming back toward the old levee, between the old levee and the buildings, between the old levee and the farm houses, where the Scheibers live, there is pretty good land in there?     A. Yes.

Q. How many acres to that have you figured it, of the very best land on the ranch?

A. Well, I would figure that from two hundred and fifty to \$300 an acre.

Q. \$250 to \$300 an acre?     A. Yes.

Q. How many acres?     A. About 200 acres.

Q. Now, then, as you go back the land is not so good, is it?     A. No.

Q. How many acres in the next classification?

A. I think there is about 200.

Q. About 200 in the next class?     A. Yes.

Q. How much an acre would you figure that to be?

A. Well, that makes 250, I mean to say, the rest of the ranch—that is all good land.

Q. You figure 200 acres to the good land and then you have got the balance of the ranch in one?

Mr. MILLER.—He said 450 acres of good land.

Mr. MACOMBER.—Q. Land of the first class was how many acres, 200?

A. Yes. Of course, I don't know exactly.

Q. About that, approximately?     A. Yes.

Q. The next class, how many acres have you got?

A. 200 of the first.

Q. Then the balance of the ranch after you take out the 200 acres, what do you figure that to be worth?     A. About 200, I guess. [289]

Q. About 200?

(Testimony of Arnold Zimmerman.)

A. I have not figured it out exactly what the ranch would bring.

Q. That would be \$250 an acre; is that right—about \$250 for all the ranch? A. Yes.

Mr. MILLER.—Do not confuse the witness.

Mr. MACOMBER.—Q. Mr. Zimmerman, in the first place you have got about 200 acres of the first class?

A. About 200 acres, more or less, whatever it is.

Q. The price of that you say was \$250 to \$300 an acre? A. Yes.

Q. Now, then, the next class takes in all the rest of the ranch—takes in the rest to the east—going to the east? A. Yes.

Q. That would be about 250 acres? A. Yes.

Q. And you say your figure for that would be about \$250 an acre?

The COURT.—\$200 an acre he said?

Mr. MACOMBER.—Q. What did you say, Mr. Zimmerman? A. Two hundred.

Q. Upon what do you base those figures, Mr. Zimmerman?

A. I have not exactly figured them; I was talking about what the land was worth, if anybody wanted to buy land.

Q. You base it apparently on what other lands were sold for?

A. Some a little more and some less; it is according to the land,

Q. Land values from 1900 to 1911 or 1912, at the

(Testimony of Arnold Zimmerman.)

time of the reclamation—land values kept pretty steady up there for ten years previous to the reclamation work, did they not?     A. Oh, yes.

Q. Before the reclamation?     A. Yes, it has been steady.

Q. The values run along about the same?

A. There has not been many sales lately.

Q. I am not speaking since the reclamation. I am speaking before the reclamation; before the reclamation for 10 or 12 years the prices kept along about the same level?     A. Yes.

Q. Without much increase?     A. Yes.

Q. Without any increase?     A. Yes. [290]

A. Yes, I know where the Saylor ranch is. A part of the Saylor ranch is very good, most of it is sandy, it isn't as good as the Garwood ranch. The Redfield farm that lies northeast of the Garwood place does not compare with the Garwood place, it is too low. The front part of the Redfield farm is good, yes, that is good land. There is less seepage water on the low land, the drainage land is not so good. I have not figured the value of the Redfield farm; I was not buying any ranch, I don't own any land up there now. I rented land.

### **Testimony of C. E. Weinerich, for Defendants.**

C. E. WEINERICH, called for the defendants, testified as follows:

My name is Charles E. Weinerich. I reside in Sacramento. I resided there in 1911. At that time I was in the office of the California Colonization

(Testimony of C. E. Weinerich.)

Company frequently. I had an office in the same office. I was secretary of the land company of which they were sales agents. Along about that time, about September, 1911, I saw Dr. Ramos and the plaintiff, Miss Garwood, in the office of the California Colonization Company frequently. They were inquiring for the sale of the land. I afterwards learned that it was the Scheiber ranch. I saw Mr. Scheiber there too, afterwards. Yes, before they purchased the property, I heard a conversation between Dr. Ramos and Miss Garwood. That was on "K" Street in 1911, in front of Turner Hall; they were walking on the street and I was immediately behind them. I know Miss Garwood said something about buying the place, and Dr. Ramos turned to her and said, "Dike won't [291] pay me the commission," and she answered, "Make him do it, my dear, make him do it." I reported that conversation to Mr. Crane. I went around and spoke to Mr. Crane about it.

**Cross-examination.**

Ramos said to Miss Garwood "They won't pay me the commission"—won't pay the commission or won't pay me, I am not positive whether it was won't pay me, or pay the commission—Dike won't pay the commission. [292]

**Testimony of Morris Scheiber, for Defendants.**

MORRIS SCHEIBER, called for the defendants, testified as follows:

Mr. HEWITT.—Q. Mr. Scheiber, you are one of

(Testimony of Morris Scheiber.)

the defendants in this case, are you? A. Yes. Q. Where do you reside now, where do you live? A. At Nicolaus. Q. Where were you born? A. In Switzerland. Q. Are you a citizen of the United States? A. Yes.

Mr. MACOMBER.—We object to that, Mr. Hewitt, upon the ground—unless it is shown that he was a citizen before the commencement of this action; of course I think it is immaterial anyway, but I want to introduce the objection that it is immaterial, irrelevant and incompetent.

Mr. HEWITT.—Q. Had you declared your intention to become a citizen of this country before this action was commenced? A. In this court here? Q. No, in any court, had you declared your intention, had you taken out your first papers? A. No. Q. I mean had you declared your intention to become a citizen before any action was commenced against you by Miss Garwood? A. That means if I had taken out my first papers, don't it? Q. Yes? A. No, I did not take the first papers out. Q. You did not take them out until after you sold the ranch? A. Until after I sold the ranch. Q. When did you come to America? A. In 1889. Q. Did you come here direct from Switzerland? A. Yes. Q. Had you been schooled at all in the English language before you came here? A. No. Q. Have you ever been to school in this country? A. No. Q. Then the only knowledge you have of the English language is such as you have acquired in contact with other people who speak the language, is it? A. Yes. Q. You know the ranch known as the Scheiber Ranch or

(Testimony of Morris Scheiber.)

the Nicolaus Allgier Ranch, do you? A. Yes. Q. You are one of the parties who sold the ranch to Miss Garwood? A. Yes. Q. Have you had the ranch [293] surveyed at any time? A. After we sold it, yes. Q. You employed Mr. Von Geldern, did you, to survey it, as one of the surveyors? A. Yes. Q. Did you point out or assist in pointing out the boundary lines of the place? A. Yes. Q. Did you point them out to him correctly? A. Yes. Q. How long have you lived in California? A. 26 years. Q. How long did you live on the Allgier Ranch? A. 19 years. Q. From whom did you buy it? A. From the Pacific Mutual Life Insurance Company of San Francisco. Q. What was the name of the ranch? A. The Nicolaus Allgier ranch. Q. What was the reputed acreage of the ranch? A. Well, the deed called for 600 acres more or less; that is the way we bought it. Q. Was it not generally known in that locality as the 600-Acre Ranch of Nicolaus Allgier? A. Yes. Q. Where is the Feather River located with relation to that ranch—where was it located before you sold it to Miss Garwood? A. Well, the Feather River was located on the west side and a ways it was located on the north side. Q. It formed the western and northwestern boundary of the ranch, did it, the river? A. Yes, it formed a kind of a bank. Q. The river was one of the boundaries of the ranch? A. The river was one of the boundaries, yes. Q. What use did you make of the ranch when you owned it? A. A dairy; dairying. Q. In what con-

(Testimony of Morris Scheiber.)

dition was the ranch when you bought it? A. The ranch was in miserable condition, as low down as it could be. Q. How were the improvements on it?

A. There were no improvements on it except a little bit of a shack and an old barn which Miss Garwood had torn down afterwards. Q. And the improve-

ments that were on it when Miss Garwood bought it were placed there by you and your brothers, were they, aside from that barn? A. How about that?

Q. The improvements that were placed on the ranch were put upon the same by you and your brothers, were they? A. Yes. [294] Q. At the time that

you bought it was any of the ranch planted to alfalfa? A. Yes—when we bought it you say? Q.

Yes. A. No. Q. What was it planted in, if anything, when you bought it? A. It was planted to

nothing, it was covered with weeds. Q. What use was made of it? A. It was pastured on. Q. All

pasture? A. That is the last year before we came there. Q. Did you rent the ranch some time be-

fore you contracted to buy it? A. Yes. Q. How many years before? A. About six years. Q.

About six years before you bought it you rented it?

A. Yes. Q. You bought it in 1899? A. Yes. Q.

Do you remember how much you expended in the matter of the improvements, buildings and fences on the ranch? A. I could not say exactly but then

I judge the expenses on the buildings and everything was between fifteen thousand and seventeen thousand and \$18,000. Q. During the time that you

had the ranch under lease did you seed any of it to

(Testimony of Morris Scheiber.)

alfalfa? A. Yes. Q. There was some timber land on the place, was there not? A. Yes, there was some there. Q. Where was that timber land located? A. On the other side of the levee between the river and the levee, below the levee. Q. Where did the county roads or private roads run through the ranch, Mr. Scheiber, at what point? A. Well, one road runs along the old levee down to Nicolaus, coming down from Nicolaus going to Vernon, and the other road comes kind of east from the Straigh place—it comes in from the east, north, and comes in by Saylor's place and comes by Saylor's place and comes over to the levee, at the corner where the levee and the road parts. Q. How near to the levee does the county road run? A. At the foot of the levee. Q. For how long a distance? A. Right along the levee for about I should judge a quarter of a mile. Q. Standing in a conveyance or seated in a conveyance can the timber land be seen on the other side of the levee from the road? A. Yes. Q. Are there places where there are [295] openings where you can see some distance? A. Yes. Q. Was that the case in September and October, 1911? A. Yes. Q. How much of the ranch did you seed to alfalfa, Mr. Scheiber? A. I should judge about 200 acres. I do not know exactly. Q. Was that fenced off from the rest of the ranch in 1911? A. Yes. Q. You used that for making hay? A. Yes; we used that for hay. Q. How many cuttings of alfalfa did you make from that land? A. Well, on that best part around there we got as high

(Testimony of Morris Scheiber.)

as 6 crops. Q. How much alfalfa to the cutting was generally produced? A. Well, I think about an average of about 6 crops, about one and a half tons to the acre, maybe a little more. Q. A ton and a half to the acre? A. Yes. Q. How many cows did you keep on the place? A. We did not keep the same amount all the time; when we first came there we did not have so many cows because the land was not in condition to keep many cows. Q. In 1911, in September and October, how many cows did you have? A. There were there about 167 or 170—I don't know exactly; 167, I think. Q. And horses? A. There were about 20 horses. Q. You had other stock, hogs and calves? A. Yes. Q. Did you plant any of the quarter section, that lower quarter to alfalfa while you had the place? A. No. Q. What did you use it for? A. We used it for pasture, and we cut some hay there too sometimes. Q. In going over the land could it be easily seen what use was made of it? A. Yes. Q. Have you known of any lands lying east of that quarter section being seeded to alfalfa? A. East you mean? Q. Yes. A. Yes. Q. What place? A. Harry Hanson's; that is about a quarter of a mile, and Mays is a quarter of a mile further out. Q. What kind of a stand of alfalfa did they have? A. Harry Hansen, he just got the third crop away about two weeks or three weeks, and Mays the same way—pretty good crops. Q. Was it a fair stand of alfalfa? [296] A. A fair stand of alfalfa. Q. How much per acre was being produced on the Hanson land at

(Testimony of Morris Scheiber.)

the cutting? A. I think about—

Mr. MACOMBER.—We do not care what he thinks, what he knows.

A. I think 6 tons to four crops.

Mr. HEWITT.—Q. Have you seen alfalfa growing on that 160 acres since the sale to Miss Garwood? A. Yes, there is about 40 acres right at the present time. Q. What kind of a stand is it. A. Fine. Q. Do you know how many times it has been cut? A. It was pastured in the spring and then they cut the second crop about three weeks ago, and it was a real good crop out there and they had a good start for another crop. Q. How is the land bounded by ranches? In your deed to Miss Garwood the land is bounded by certain ranches. It says “Being the whole of the so-called Nicolaus—Allgier Ranch situated below the town of Nicolaus, bounded on the east side by the farms of P. Straugh”—who owns that farm at the present time? A. That is now Mays, and a part of it is—I don’t know the name—that is on Mays’ there. Q. At that time when you sold it to Miss Garwood, was it bounded on the east by the Straugh land? A. May was already there—Johnnie Schwall was there. Q. And Phil R. Drescher—who owns that land now? A. That is Paul Drescher. Q. On the north by the Redfield farm—who owns that at the present time? A. At the north by the Redfield farm? Q. Yes. A. That is ours, Scheiber property. Q. On the west by the Feather River and on the south by the farms of Claus Peters and John Schwall. Claus

(Testimony of Morris Scheiber.)

Peters' ranch is shown on this map. Where was the John Schwall ranch—which one is that? A. John Schwalls was out from Martin Schwalls over to the east; the line runs from west to east. Q. Who owns that land now? A. That is Pete Schwalls. Q. Have you ever had any experience in alfalfa drowning out, being killed by water? A. Yes. Q. How long did it take for water to kill alfalfa? A. Well, it depends on how the weather is. In the spring, when [297] the weather is real warm and the water lays shallow, the water gets warm and that cooks it out a great deal quicker than it does in winter. In winter when the weather is real cool, sometimes it can lay on the alfalfa for two weeks, as long as three weeks, it won't hurt it very much. Q. Who farmed the place for the first month after Miss Garwood bought it, after she got her deed? A. Scheiber Brothers. Q. Under a contract with her for that purpose? A. Yes, that was a separate arrangement. Q. A separate matter? A. Yes. Q. It was under a contract, was it—you made a contract? A. We agreed to run the place for a month, until she got a man on the place to run it for her. Q. Now, do you know who furnished the items for this statement, Mr. Scheiber, noting the amount of milk and cheese sold—do you know who made out the statement? A. I guess it was Scheiber Brothers made it out, but this is printed. This was made out by White, Miller & McLaughlin. Q. You furnished the items for the statement, did you? A. Yes. Q. Now, we have on this state-

(Testimony of Morris Scheiber.)

ment, sale of four calves, \$24. Were those calves on the place when it was bought, or were they born there during the month? A. I think they were born during the month. Q. Then John Grausman, 6 calves, \$40. Were they on the place when it was taken over by Miss Garwood? A. No, they were born during the time we ran the place for her. Q. The Capital Dairy, milk, \$367.35. What would that represent? A. That was milk that we furnished to the Capital Dairy. We usually sold lots of milk to the Capital Dairy. Q. Was that milk that was produced on the place during that month? A. Yes. Q. American Cash Store, cheese, \$104.66; was that produced on the place during that month? A. Yes. Q. Then, Ennis Brown Co., cheese, \$306.15, was that cheese produced on the place during the month that [298] you were farming it for Miss Garwood? A. Yes. Q. Was there any cheese on the place that you turned over to Miss Garwood when you left? A. Yes. We did not sell her any. Q. What do you say, you did not sell her any? A. I mean—don't you mean if we didn't turn any cheese over when this month was up? Q. You did not sell any cheese to her? A. No, we did not sell any cheese to her. Q. When you quit at the end of the month, was there any cheese on hand? A. Yes, that is what I mean. Q. Was it made during that month? A. Yes. Q. How much cheese was on hand? A. About \$200 worth.

Mr. MACOMBER.—Pardon me, Mr. Hewitt, we do not want to be interrupting each other with ob-

(Testimony of Morris Scheiber.)

jections. Cannot we stipulate that all this testimony is objected to?

Mr. HEWITT.—I think the Court indicated that.

Mr. MACOMBER.—What did it say?

Mr. HEWITT.—That he did not want us to be too technical about objections, that it was not before a jury, and that he would consider all of these things when he read over the testimony.

Mr. MILLER.—It is just as well, if you have any objections, I think, to state your objections.

Mr. MACOMBER.—It will be understood that we will object to all this line of testimony as immaterial, irrelevant and incompetent.

Mr. HEWITT.—Q. What were you to receive under your contract with Miss Garwood for taking care of the place that month? A. \$400 for all the expenses. Q. How does the month of November, in the matter of dairying, compare with other months of the year with reference to results? A. Well, the month of November and December—especially the month of November, is usually the poorest for the income, that is, on a dairy. Q. What were your monthly receipts during the year prior to your sale to Miss Garwood from that ranch? [299] A. How much the receipts were, the income, you mean? Q. Yes, about what were your average monthly receipts? A. While we were on the ranch? Q. No, about how much cheese, and butter, and stock, and so on did you sell during the month—what was the average during the last year? A. Well, I think about \$2,000 a month, average. Q.

(Testimony of Morris Scheiber.)

About \$2,000 a month? A. Yes. Q. What were your expenses in the matter of labor, your own services and so on, and taxes during that period? A. Well, I think it took a good half of that. Q. About half? A. Yes. Q. That would be, then, in the neighborhood of about \$1,000 a month profit? A. Yes, maybe not quite as much as that. Q. Were there many months when your cheese and butter sales ran above that figure alone? A. Average, you mean? Q. Any month in the year? A. Some months were more and some months less that is why I figure the average about \$2,000 a month. Q. Now, when did you first see Miss Garwood?

Mr. MACOMBER.—We object to this testimony of income upon the ground that it is not the best evidence; the books and accounts that he has kept of these things would probably be the best evidence. Did you keep any books or accounts of your monthly receipts, Mr. Schieber? A. Not particularly. Q. The only thing you had was your labor account, time books? A. Yes. Q. When did you see Miss Garwood first? A. I seen her on the ranch first. Q. When? A. That was in September, 1911. Q. Who was with her? A. My brother, Joe. Q. On what part of the ranch was she? A. I seen her over in the old barn, where the old Nicolaus ranch barn used to stand. Q. Was that located near the old levee? A. Yes. Q. What was she doing there? A. She was looking at the land, and there was some cattle there, and she was sitting in the surrey, there, and Dr. Ramos and Dike, they were stand-

(Testimony of Morris Scheiber.)

ing there by the barn, by the old barn. [300]

Q. By the old barn? A. Yes; they were in the barn, too. Q. Did they have an automobile there?

A. They did not have the automobile over there, no.

Q. Did they walk over there? A. I guess they did.

Q. What was Miss Garwood there for, if you know?

A. To look at the land, I suppose. Q. Did she ask

you anything about the boundaries of the ranch at that time? A. Yes. Q. *Why* did she ask it of? A.

She asked me. Q. Did you tell her what the bound-

aries were? A. Yes. Q. What did you tell her the

boundaries were? A. I told her the boundary there

along Claus Peters' run, the south line from the

Nicolaus ranch, between Claus Peters and the

Nicolaus ranch run—I pointed over toward the levee,

across the levee, over to the old Feather River. Q.

The old Feather River? A. Yes. Q. Did you men-

tion the fact that the river was one of the boundaries

of the place? A. Yes. Q. The north boundary, did

you point that out? A. The north boundary is a

part—I could not tell her where the north boundary

was just particularly—I told her, but I could not

point out the north boundary. Q. She could not see

it from where you were standing? A. I could not see

the north boundary there from where I was standing.

Q. Did you say anything to her about its running

between that ranch and the Redfield farm? A. Yes,

I told her it runs as far as to the Redfield farm. Q.

How did she happen to be there at the ranch, if you

know? Do you know who sent her there? A. She

came over there with my brother. Q. Do you know

(Testimony of Morris Scheiber.)

where she came from? A. From Sacramento, as far as I know. Q. Previous to this time, had you any contract with the Colonization Company for the sale of this land? A. No, not at that time. Q. Did you have a contract at some previous time? A. We had one, yes. Q. One? A. Yes. [301] Q. Had that expired at this date? A. That was expired about two months before. Q. From that time forward did you ever have any written contract with the Colonization Company for the sale of this land? A. No. Q. Did you receive any communication in any way from the Colonization Company with reference to a sale of the land? A. I do not understand that. Q. Did any officer, Mr. Dike or other officer of the Colonization Company, telephone to you regarding a sale of the ranch? A. Yes, they telephoned to my brother. Q. Did they telephone to you? A. Not to me personally. Q. You did not talk with them over the 'phone? A. Not I, no. Q. Now, did Miss Garwood say anything to you at that time about the land being overflowed, or ask any questions about it being overflowed? A. She did. Q. What did you tell her? A. I told her a part of the land overflowed when the back-water comes up high, even that the levee breaks—we happen to have levee breaks—and we get flooded from the river. Q. Did you tell her anything, or did she ask anything about the back lands overflowing? A. She did. Q. What did you tell her in that regard? A. I told her that was overflowed, when the back-water comes up real high it backs up into the lower places there in the back field there—it

(Testimony of Morris Scheiber.)

comes up quite away into the ranch. Q. Could that be seen from the appearance of the place at that time, either from drift or other causes? A. I don't know. Maybe sometimes there is some drift hanging on the fences yet when the water comes up, but I could not say for sure whether there was any drift at that time or not. Q. Was the land plowed? A. No. Q. What was it used for? A. For pasture. Q. You had always used it for pasture, had you? A. At that time we did. Q. Now, Miss Garwood stated in her testimony that you had [302] told her all the good things about the ranch, and to tell her some of the bad things about the ranch. Did she use any such language there? A. No. Q. Now, she states that you pointed out a green line as being one of the boundaries of the place. What is the condition of the levee in September, or what was it in September, 1911—was the grass growing on it, or was it dry? A. No, in the fall usually the levee is pretty dry there; there is no grass growing on the levee there. Q. All dead grass? A. All dead grass and dust on it. Q. Was there any green land there to be seen? A. The trees. Q. That is over on the other side of the levee? A. Over the other side of the levee. Q. They could be seen to extend quite a distance westerly from the levee? A. Yes. Q. She spoke of a white house or stable. Was there any white house located anywhere near the levee on that ranch? A. No. Q. Was there any white stable there? A. The old barn. Q. Was it painted white? A. No; that was an old barn; it was not painted, and it was not whitewashed, either.

(Testimony of Morris Scheiber.)

Q. Had it ever been painted? A. Not that I know of. Q. Now, again, did you ever tell Miss Garwood that the levees on the ranch were all built, and she would not have any assessment to pay? A. No. Q. Did you ever tell her anything *about*, while she was there on the ranch, about getting back \$5,000 and some odd? A. No. Q. Did you make any untruthful representations to Miss Garwood concerning that property in any way? A. No. Q. When did you next see Miss Garwood? A. At Mr. Dike's office in Sacramento. Q. Do you know about what time that was? A. That was in the afternoon; I think it must have been about two o'clock, something like that. Q. When she was there at the ranch, Mr. Scheiber, when you met her there, did you answer all of the questions that she asked you about the ranch, truthfully? [303] A. I did. Q. How did you happen to go down to Dike's office, or the Colonization Company's office? A. Well, they told us to come down to make the arrangements for the sale. Q. You went down? A. We went down. Q. Did you have any conversation with Miss Garwood at that time? A. In Dike's office, yes. Q. In Dike's office? A. Yes. Q. Did she again ask you at that place anything about the acreage on the ranch? She did. Q. What did you tell her? A. I told her the deed says 600 acres more or less, we never had it surveyed; that is the way we bought it, and that is the way we sell it. Q. Did you ever place a price by the acre upon that land? A. No. Q. Did you meet Mr. Ramos there? A. Dr. Ramos was there, yes, Miss Garwood, myself

(Testimony of Morris Scheiber.)

and my two brothers, Joe and John, and Dike was there part of the time in that back room; most of the time he was called to the front office there. Q. Did they try to get the property for any less than the \$75,000? A. Yes, they did. Q. Who tried to? A. Miss Garwood and Dr. Ramos. Q. Did Mr. Dike say anything to you about it? A. Mr. Dike wanted it, too, yes, sir; he was talking about it. Q. But you insisted on the full price of \$75,000 for the ranch? A. We told them we wanted \$75,000 for the ranch and the hay has got to be bought separate. Q. Did you have any conversation with Dr. Ramos concerning that matter of getting a reduction? A. Yes. He tried to get it cheaper; he wanted us to throw the hay in with the ranch. At first he tried to get the ranch cheaper, but we told him that was our price, and we would not sell it any cheaper; then they tried to get the hay, wanted us to throw the hay in with it, and we told them no, we would not do it; if they wanted it they could take it, and if they did not want it they could leave it be, that we had had a good success on the ranch, and we did not care if they did not want it that way, [304] they could leave it be. That is the way we spoke to them. Q. Did they try to get you to reduce the price more than once? A. I don't know. I think Dike did before, too. Q. Did you have any conversation with Dr. Ramos with reference to what he would do under similar circumstances? A. Yes, right there in the office, he, Dr. Ramos, wanted us to throw the hay in, he thought the hay belonged with the ranch, and I told him no, and

(Testimony of Morris Scheiber.)

he thought yes, it ought to go with the ranch. He says, "You made that hay on the ranch and that ought to be thrown in." I said, "Well, Dr. Ramos," I says, "Doctor, you are a doctor, ain't you?" And he says "Yes." I says to him, "Now, for instance if you have got a practice some place and have an office and you practice during the spring, and in the spring usually there is most of the people getting sick, in the spring more people sick than during the fall, and for instance you kept your office during the spring and practiced, and then in the fall you might sell out, you would not give that money back to that man you sold out your office to—what you made during the spring on your patients"; then he laughed and he says, "no, that is right." Miss Garwood laughed, herself, too. Q. Was a deposit paid, or had it been put up at that time, do you know? A. Yes, she deposited some money on it. Q. When did you next see Miss Garwood? A. Next I seen her in Mr. White's office. Q. When was that? A. That was a day or two afterwards. Q. Was it when the contract was drawn? A. Yes. Q. Who drew the contract? A. Mr. White. Q. Did you employ him to draw the contract? A. Yes. Q. Did you ask him to draw the contract? A. Yes. Q. Had you been to Mr. White's office before you and Miss Garwood went there? A. No. Q. It was when all of you went together that you asked him? A. Well, we all went there [305] together. Q. Did he draw the contract that day? A. He drew the contract, yes. Q. Now, who was there when the contract was drawn? A. I and my

(Testimony of Morris Scheiber.)

two brothers, Miss Garwood and Dr. Ramos and Dike and Mr. White. Q. Was anything said at that time

and place about getting the property any cheaper?

A. Yes, they kind of started in to argue about the price again with us. Q. What did you tell them?

A. Well, we told them we did not want to sell it any cheaper, and that is the end of it. Q. Was the contract

read over there in the office? A. Yes. Q.

Do you recall any conversation that took place there with reference to the acreage of the ranch? A. Yes.

Q. What was said—anything said to you? A. Miss

Garwood asked me there again about the acreage. Q.

What did you tell her? A. I told her we bought it

as 600 acres more or less, and we never had it surveyed, and we would sell it as we bought it. Q. Did

you hear her during the reading of the contract—who had the contract? A. Mr. White. Q. Did you

hear her— A. I think he gave her a copy, too, to read when he read it. I can't remember, though, for

sure, but I have got an idea about it. Q. Did you

hear her during the time of the reading of that contract, when it came to that portion of the description,

600 acres more or less, say "Stop right there, Mr.

White, I want to know what that means. It is my

understanding that I am getting 600 acres of the finest alfalfa land in the state of California," or words

to that effect? A. No, I did not hear it. Q. Were

you in a position to have heard it if she had used that language? A. Yes, I could have heard it if she had

used it. Q. Where did you sign the contract? A.

in White's office. Q. What was done with the

(Testimony of Morris Scheiber.)

deposit money after the contract was signed? A. It was put in the Fort Sutter National Bank, in escrow.

[306] Q. Did Miss Garwood say anything to Mr. White in that conversation in his office at that time about she thought she was buying a pretty good ranch?

A. Yes, she did. Q. What did Mr. White say, if anything, in reply? A. Well, Mr. White said, "I don't

know anything about the land, but as far as I know it is a good neighborhood, a good location, up in Nicolaus, and the alfalfa land raises good crops. Q.

Had you and your brothers previously agreed with the Colonization Company to pay them a commission if they would find a purchaser for the ranch? A.

Well, that was understood when he was going to bring Miss Garwood up, with my brother Joe, that is, he asked us if the ranch was for sale, yet. Q. That

was a conversation had over the telephone, was it not? A. Yes. Q. Were you on the same line that

your brother was at the time, the same telephone line?

A. I was. Q. Did you hear the conversation, too?

A. Well, I just heard a little of it, that is all. Q.

But they asked if the place was for sale? Yes. Q.

What was the reply? A. Well, my brother told them yes, the place was for sale yet if we got our price.

Q. Was the price mentioned? Did you hear the price mentioned over the 'phone? A. Yes. Q.

What was the price? A. \$75,000. Q. Was there

any other condition attached to it? A. Yes. Joe, my brother, told them if the party wanted to buy the ranch they have got to buy the personal property, too.

Q. The contract was signed that day, that is, on the

(Testimony of Morris Scheiber.)

27th of September, according to the contract. After that, when did you see Miss Garwood again? A. I have not seen Miss Garwood any more after that until when we made the deed out. Q. Until the deed was made out? A. Yes. Q. When did you pay the Colonization Company the commissions for selling, or for finding a purchaser? A. That [307] was a few weeks after the deed was given her. Q. Two weeks? A. About a week or two afterwards, we made out a check, and we told Dike that as soon as we received the money from back East where she made out the check from, we would pay him his commission. Q. How much commission did you pay him? A. \$3,750. Q. Now, did you have any knowledge of the payment of any portion of those commissions to Dr. Ramos at any time during the negotiations for the sale of that place?

Mr. MACOMBER.—This is objected to, upon the ground it is immaterial, irrelevant and incompetent.

A. No.

Mr. HEWITT.—Q. When did you first hear about any commissions having been paid to Dr. Ramos? A. That was long after we gave her the deed. Q. In your talk with Miss Garwood when she was on the ranch, did you mention to her anything about where you got your wood for your domestic purposes? A. Yes, when we were over there at the old barn, there. Q. What did you tell her? A. She asked me what that land was good out there for, and I told her we got the wood out there, firewood, and she kind of inquired if there was any market up in this direction

(Testimony of Morris Scheiber.)

for wood, and I told her, "Yes, there is some market in the fall, some of the plains' people come from the river and get their wood for the winter." Q. During the time that elapsed between your signing of the contract for the sale of that property and the giving of the deed to Miss Garwood, did any other parties approach you to buy the place? A. Yes. Q. Did you receive any offers from other parties to buy?

Mr. MACOMBER.—This is objected to upon the same ground, immaterial, irrelevant and incompetent. A. There was a man there with an automobile came to the place and he asked me—he heard this place [308] was for sale, and I told him the place was for sale, but the place is sold, or as much, as we got some money on it, paid down on it; then he was awfully sorry that he didn't get there before, and he asked me how much we got for it, and I told him \$75,000, and he says, he only wished he knew it, he would like to get that place, and he would take it; he told me if I thought whether the party would take the place, and I told him yes, I thought they would take it, because they deposited quite a sum of money on it, and I did not think they would leave that money go; and then he says, "In case"—he gave me his card, and he says, "In case the party won't take the land, let me know immediately, and I will take it."

Mr. HEWITT.—Q. At the same price? A. At the same price, at \$75,000. Q. Where did this party live? A. He said he came from Colusa. Q. Do you know his name? No, I could not tell the name. I had his card for a long time, I saved it, and then

(Testimony of Morris Scheiber.)

afterwards, I don't know, I must have lost the card or mislaid it. I was not looking for the card anyhow, after we had the ranch sold. Q. At the time of the making of the deed, or when the deed was made out, how was the purchase price paid? A. Well, she paid down \$5,000 when we made the contract out, and then the balance of the money—she made out a check for the balance of the money for the real property—I think the balance of the money must have been something like \$30,000—then she paid \$2,000 on the personal property. Q. How was the balance of it paid? A. The balance of the personal property—Q. The real property. A. We took a mortgage for \$20,000. Q. From her? From her. Q. Has that mortgage been paid? A. That mortgage has been paid, yes.

Cross-examination.

Mr. MACOMBER.—Q. Mr. Scheiber, you don't remember that man's [309] name? A. No. Q. You never saw him before? A. I never saw him before. Q. Is that the only offer you received? A. Many times we got offers. Q. For \$75,000? A. They never mentioned particularly; I could not say just particularly, but afterwards we could have sold. Q. At the time that Dr. Ramos and Miss Garwood were up on the ranch, when he tried to get you to let the hay go in with the ranch, that was the first time? A. He never tried it the first time. I was not there the first time, I did not see him. Q. That is the first time they were up there? A. I did not see him the first time. Q. Then, as I understand you, it was not when they were on the ranch the first time

(Testimony of Morris Scheiber.)

that they tried to get you to take the hay off, let the hay go with the land? A. No. Q. It was when they were up there the second time—

Mr. HEWITT.—I do not think there is any testimony here that any effort was made when they were on the ranch, to get hay thrown in.

Mr. MACOMBER.—Q. Weren't they on the ranch when you were talking to them? A. When Dr. Ramos and Miss Garwood were there the first time?

Q. Yes. A. I was not there. Q. Where were you

talking, what part of the ranch were you standing on with Dr. Ramos when you told him about being a doctor and charging his patients? A. I did not talk

to the doctor. Q. You said, "Doctor, suppose you had a practice and you had patients in the spring, and you sold out your office in the fall"— A. (Intg.)

I told him that in Dike's office. Q. Now, Mr. Scheiber, did you tell her to what extent the water overflowed in the rear? A. I did. Q. What did you

say? A. I told her when the back water comes up from the back, all the lower part of the land gets flooded. Q. How long did [310] you tell her it

stayed over the land? A. I never mentioned it. Q. You did not tell her? A. No. Q. What did she say when you told her that? A. She did not say anything.

Q. She did not say anything? A. No. Q. In reference to that Redfield farm that lays over on the northeast side of this place, of the Nicolaus place, isn't

there a white barn there—there is a white building there? A. There is a white building there at the Redfield place. Q. On the Redfield place? A. Yes.

(Testimony of Morris Scheiber.)

Q. Now, I didn't get what you meant when Mr. Hewitt was asking you about places where you could see through. What did you mean by openings on the levee there? A. I suppose that is from the road, when you came down along the levee, you know what it is— Q. (Intg.) Yes. A. (Continuing.) When you go by there and look in towards the woods there, you can see spaces where there ain't any wood; some kind of space where the trees are away; you can see in aways there toward the river, can't you? Q. I guess so. A. That is what he means. Q. What did you say about the land going over the levee? A. I did not say the land going over the levee. I said the line goes over across the levee to the old Feather River, clear over to the Feather River. Q. You told her that the land went to the river? A. Yes. Q. Did not say that any land went across the river? A. Across where? Q. Did you tell her any land went across the river? A. No, not across the river, says, "Over to the old Feather River." Q. Do you know whether she understood at the time or not that the river was up against the levee or whether it was away back from the levee? A. I don't know. Q. You don't know? A. No; she did not say anything. Q. Now, in respect to these improvements, you say that since you were on the place you have put in about how many thousand dollars in improvements? A. We put in from \$15,000 to \$18,000 in improvements. Q. In respect to these improvements, what were they? [311] A. What were they? Q. Yes. A. You have seen the build-

(Testimony of Morris Scheiber.)

ings, haven't you? Q. Yes, but I don't know anything about those things. A. Well, we put all the buildings there, fences—all the fences; put in alfalfa; that includes all; I mean the improvements that we put there, the buildings and pipes and tanks and all of those things. Q. Now, as a matter of fact, there were fences on the place when you went there, weren't there? A. No. Q. Was not the place fenced there when you went there? A. There was no fence there to it. Q. No fences? A. No; here and there a wire stretched; that would not keep the cattle out; the fence had to be fixed all around the fence. Q. Now, as a matter of fact, Mr. Scheiber, when you left that place, were not those fences in a rotten condition? A. The fences were in good condition. Q. As a matter of fact didn't they fall down and let the cows into the alfalfa, so that six of them died? A. No; they broke them down, I suppose. Q. With respect to the fences and buildings, how many buildings did you put up? A. Well, there is the house there, isn't there? The big barn, the tank-house, feed-house, little out-houses there, shacks and things—cheese-room and all those things. Q. That cheese factory was sold extra, was it not? A. The cheese factory? Q. That was put in as personal property, was it not? A. The building? Q. Yes. A. I should think not. Q. How much did you say these buildings were worth at the time you left that ranch? A. I guess the buildings and improvements were worth about the same—Q. (Intg.) Do you mean to say now that there were no buildings on the ranch when you went there? A.

(Testimony of Morris Scheiber.)

Excuse me; that means when we left the place. Q. When you bought it, I mean. Read the question.

(The last question repeated by the reporter, as follows): [312] "Q. Do you mean to say now that there were no buildings on the ranch when you went there"? A. No; there was nothing but a little house and the old barn. Q. No buildings, and no fences? A. No fences to amount to anything. Q. What barn was it that fell down, Mr. Scheiber? A. That was the old Nicolaus Algier barn; the old man Nicolaus Algier he built that barn when he first came to this part of the country. Q. Was there not another barn that fell down? A. No. Q. You say you paid between \$15,000 and \$18,000 for improvements. Did you ever keep any account of those things? Did you keep any records that you can bring here to show that? A. I could bring some records, yes. Q. You did not bring them, though? A. I did not bring them along, no. Q. This figure that you gave us, between \$15,000 and \$18,000, is an approximation? A. That is an approximation, not less than \$15,000; I do not say more than \$18,000. Q. You say in respect to that lower section down there, that quarter section of 160 acres, you used that for pasture? A. Yes, we used it mostly for pasture; we cut some hay there a few times. Q. Why didn't you put that in alfalfa? A. Because we needed it for pasture. Q. Wouldn't you have been able to get along if you had put it in alfalfa? A. We could have got along, but we could not have let them into the alfalfa in the spring, we wanted some natural feed for the cows, something green; if

(Testimony of Morris Scheiber.)

we let them into the alfalfa, we would lose some of the cows. Q. Now, you know as a matter of fact that if you put that into alfalfa you would get very little alfalfa there, don't you? A. Very little—where do you mean? Q. That quarter section. A. I think that quarter section raised about four crops of alfalfa. Q. You think it raised four crops, do you? A. Yes. Q. That is, provided it did not get [313] washed out? A. It won't get washed out, that is when this levee proposition is completed. Q. But it would have been washed out before? A. Maybe some of the little lower places there. Q. As a matter of fact, it was planted by George Duff two years ago, and one year later it was all washed out, was it not? A. No. Q. In fact, was not a large portion of it washed out? A. Maybe some washed out. Q. In respect to that which is left, you said a moment ago, in respect to the alfalfa that Miss Garwood put in, a portion of which is still standing, you told Mr. Hewitt that was a fine stand of alfalfa, did you not? A. It is a fine stand of alfalfa. Q. Don't you know it is a very rotten stand of alfalfa? A. I say it is a fine stand of alfalfa. Q. How many tons of alfalfa to the acre will that quarter section cut out there? A. I could not say exactly, but I think it will make from 6 to 7 tons average, anyhow 6 an acre. Q. When you were at Mr. White's office, you say that Miss Garwood did not interrupt him, did not say anything about more or less? A. I never heard anything about that thing. Q. Now, when you talked to Miss Garwood about the acreage, when she

(Testimony of Morris Scheiber.)

was up at the ranch and asked about the acreage, you said 600 acres more or less? A. Yes. Q. You always said "more or less"? A. 600 acres more or less; we never had it any other way. Q. By the way, Mr. Scheiber, when did you first get acquainted with that expression "more or less"? A. We bought it as more or less, and we intended to sell it as more or less, because we never had it surveyed, and we did not want to go to the expense of surveying the place. Q. Now, Mr. Scheiber, you say that you never had the place surveyed? A. Not before we had it sold. Q. Now, did you ever have any occasion to consider how many acres you had? A. Well, no—we could not consider very much about it. Q. You never thought about that? A. We [314] guessed at it. Q. As a matter of fact, didn't you have a surveyor from Sacramento one time survey that? A. After Miss Garwood was in possession, yes. Q. But before you sold it to Miss Garwood? A. No. Q. Do you mean to say you never had that place surveyed from the time you bought it from the Pacific Mutual until you sold it to Miss Garwood? A. No. Q. You never had a surveyor on that place? A. No. Q. How many acres did you figure—at the time you sold it to Miss Garwood and previous to that, how many acres did you think you had? A. Well, I didn't know; I thought there was maybe less than 600 acres and maybe more. Q. When you bought that land of the Pacific Mutual, you paid \$26,000 for it? A. We paid \$27,000. Q. Are you sure it was not \$26,000? A. I am sure. Q. What

(Testimony of Morris Scheiber.)

was the \$27,000 for? A. There was an extra thousand. Q. What was that for? A. There was \$1,000 paid cash and the balance—

Mr. HEWITT.—We object to that as immaterial, irrelevant and incompetent. A. \$26,000 was installments, and \$1000 we paid down cash.

Mr. MACOMBER.—Q. Isn't it a fact you paid \$1000 down and there was \$25,000 remaining? A. There was \$26,000 left. Q. You were to pay the balance at \$500 a year? A. Yes, with interest. Q. Now, Mr. Scheiber, here is what I want to get at: When Miss Garwood was on the ranch, did you, when you were talking with her about the boundaries, pointing out the boundaries—where were you standing? A. Over there where the road makes a bend, at the corner where the old barn used to be, right in the land, not on the road. Q. Can you fix the place on this map, here, with a cross in lead pencil? A. I don't know much about a map; I don't understand much about it; but you know where the old barn used to stand; you have been there. Q. Where was it you were standing? Anywhere near the [315] ranch house now where George Duff lives? A. No, I was not over there. I was over there where the old barn used to be, over where they built the new levee, near where they built that new levee down and cut across a part through the Nicolaus ranch into Claus Paters, where they made that new channel. Q. You can't say now whether she understood about the river being up against the levee, or not? A. She understood perfectly. I told her that the land goes clear

(Testimony of Morris Scheiber.)

out to the river, over across the levee out to the old river there, and I pointed it out to her. Q. Did you tell her how much land there was out there? A. No. Q. Did she ask you? A. No. Q. You did not point out any land across the river? A. Across the river? Q. Across the levee. A. Across the levee? Q. Outside of the levee. A. Yes, I told her over across on the other side of the levee, clear over to the Feather River, the old Feather River. Q. You seem to have a very good recollection of this thing at the present time? A. I have. Q. Do you remember giving your deposition before Mr. Devlin, in Sacramento? A. Yes. Q. You remember that time? A. I do. Q. Now, Mr. Devlin asked you this question, on page 35, about the fourth or fifth line from the top: "Q. Did *she* *you* anything about cattle? A. Not as I know of. "Q. She asked you questions, but you don't know what they were: "Is that correct? A. She asked me about the sale, etc. "Q. Do you remember any questions she asked? A. No." Q. Did you give that testimony? A. I didn't remember at that time.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

Mr. MACOMBER.—You remember giving your deposition before Mr. Devlin in Sacramento? A. I do. Q. Before a shorthand reporter, and your attorney, Mr. Hewitt was present at the time. Do you [316] remember giving that testimony? A. I remember. Q. You gave those answers? A. Yes. Q. This is what Mr. Devlin said: "Q. Do you re-

(Testimony of Morris Scheiber.)

member any questions she asked you?" And you answered "No." A. I did not remember it then. Q. "Q. She did ask you other questions that you don't remember. "Is that correct? Tell me she did or she did not. "A. She asked questions. "Q. You don't remember what they were? A. No, sir. A. That is right, I didn't remember it. Q. You didn't remember them then? A. I didn't remember at that time. I remembered afterwards. Q. "You made answers to them, but you don't remember what the answers were: Is that correct? "A. I give her the right answers to what she asked me. "Q. But you don't remember what the answers are now? A. No." Did you give that testimony?

Mr. MILLER.—The same objection. A. I don't remember the answers or questions that she asked me, no.

Mr. MACOMBER.—Q. You did not remember them then? A. I did not remember them then. Q. But you remember them all right now? A. Well, I remembered it afterwards. Q. You remembered it afterwards? A. Yes. I was kind of rattled.

Q. Now, as a matter of fact, isn't it possible that some things you don't remember now? A. Yes, I do. Q. You say you remember everything now? A. I don't know as I remember everything, but whatever I say is true. Q. You told her the line went over the levee: Is that correct? A. Over across the levee, clear over to the old Feather River, and I pointed the way the line goes. Q. And then you told her it went along the fence, did you? A. I never

(Testimony of Morris Scheiber.)

said along the fence. I pointed over that way, the fence run that way; you could not see the fence on the other side of the levee. We was not on top of the levee at that time. I could not show her the fence on the [317] other side of the levee. Q. At the time you were with Miss Garwood? A. I was. Q. Where were you, in a buggy together? A. No, I was not in a buggy. I happened to go by there. Q. Were you not driving her to the station? A. I came from Nicolaus and went by there, and they were there. Q. Mr. Scheiber, it seems that there is some confusion here. Now you say that the day they came first you did not see them at all? A. The first time I did not. Q. At the time that they first called at the ranch, *where were*? A. I was at home; I was not living at the ranch at the time. Q. You were not living on the ranch at that time? A. No. Q. You did not see them at all the first day? A. I did not see them the first day. Q. That was after the sale when you were talking with her? A. No, that was before the sale. Q. Before the sale? A. Yes. Q. It was after you met her in Dike's office? A. No, that was before we met her in Dike's office. Q. Before you signed the contract? A. Yes. Q. Now, are you sure of that? A. I am sure of that. Q. What day was it—it was before you signed the contract to sell the place at all? A. Before we signed the contract, that was before. Q. Do you remember what day it was that you signed the contract? A. I think it was the 27th of September. Q. The 27th of September? A. Yes. Q. Was it

(Testimony of Morris Scheiber.)

before that? A. It was before that, yes. Q. You are positive? A. I am sure. Q. Now, who was with Miss Garwood at the time? A. My brother Joe and Dr. Ramos, Dike and my brother John; they were over near the old barn, standing there near the old barn. Dr. Ramos, I seen him coming out of the barn, too, and Miss Garwood was sitting in the survey a little further south from the barn, and my brother was standing there talking to her, and I happened to go by there— I went there and I got to talking with them, too. [318] Q. You are positive it was before you met them at Dike's office? A. I am positive it was before we made the sale, it was before that. Q. Who came out with them at that time? A. I don't know how they came. Q. Who came out with them? A. I think there was nobody but Miss Garwood, Dr. Ramos and Dike; I think those people were together. Q. If you are positive of that, then, as a matter of fact, she must have visited the ranch twice before you met her in Dike's office? A. That is what she did. Q. She did? A. Yes. Q. Are you sure of that? A. Yes, because my brother said she was there once before; they told me about when she was up there. Q. Do you remember what day of the week this was that you are speaking about now? A. I can't remember that. Q. Do you remember what day of the month it was? A. No, I couldn't remember the day of the month. Q. How long was it after the time that she talked with your brother Joe? A. After she was there the first time, you mean? Q. Yes. A. I don't know;

(Testimony of Morris Scheiber.)

I think it must have been a few days, anyhow, four, or five, or six days; I could not tell exactly; it was anyhow four or five or six days, something like that.

Q. After she was there when she talked with your brother Joe? A. After she was there the first time.

Q. Here is some testimony that you gave before Mr. Devlin, commencing at page 37, Mr. Scheiber. It says here, "Did you tell her anything about where the west boundary was? Did you tell her anything about it yourself? A. Yes. "Q. You did tell her"—

Mr. MILLER.—We object to your reading from any purported copy of a deposition. If you have the original depositions here they must be produced. We object also on the ground that no foundation has been laid for any of these questions.

Mr. MACOMBER.—Have you got a copy of the deposition? A. I have [319] got what purports to be a copy of the deposition. I don't know whether it is or not. It is not the same as yours.

Mr. MACOMBER.—Let me see if it is.

Mr. MILLER.—You cannot use ours, because it is not the original.

Mr. MACOMBER.—Q. "Did you point out the east boundaries." Is that the way yours reads? It should be the west boundaries, shouldn't it, on page 38, the second line from the top?

Mr. HEWITT.—We ask that our objection be extended to all of the questions asked by counsel. What counsel has read from is a purported copy of the depositions, and one which it appears never has

(Testimony of Morris Scheiber.)

been signed or read over by this defendant.

Mr. MACOMBER.—Q. “She went by there and I went by there with her one time.” Did you give that testimony?

Mr. MILLER.—We object to that as not being a correct quotation from the testimony.

Mr. MACOMBER.—Q. Do you remember giving that testimony, Mr. Scheiber? A. I don’t remember that. Q. You don’t remember? A. No. Q. I will continue reading from this: “She went by there and I went by there with her one time. “Q. Did you go by with her? A. That was after the sale was made that I went by.” “Q. Do you remember that? A. No, I don’t remember it, but I went by after—one time I brought her to the station after she was in possession of the place already. That is maybe what it meant. Q. “I mean at the time when she was up there, either one of those two or three times that you speak of before the contract was made, when she was up there on the place—what I want to find out is whether or not you showed her where the place was. Did you show her what you owned? “A. No, sir. I never went around the place.” Did you give that testimony? A. I don’t remember that. Q. You don’t remember [320] giving that testimony? A. No. Q. Is that true?

Mr. MILLER.—We object to the question as immaterial, irrelevant and incompetent, and instruct the witness not to answer.

Mr. MACOMBER.—Q. Did you ever, during the time that she was up there, that is before you met

(Testimony of Morris Scheiber.)

them at Dike's office, point out the place to her?

A. I did. Q. That was on the second time she was

there, but before she signed the contract in Dike's

office? A. That was before she signed the contract

in Dike's office. Q. This deposition goes on to read:

Q. You did not? A. No, sir." Do you remember

giving that testimony?

Mr. MILLER.—We object to that as unintellig-

ible, absolutely impossible for anybody to tell what

is meant.

Mr. MACOMBER.—It follows right after what I

read previously. A. I don't remember it. Q. Now,

Mr. Scheiber, I have read to you what Mr. Devlin

questioned you about in respect to whether or not

you showed her the place; at any time, any one of

these times that you saw her on the ranch before you

signed the contract. Now, in this deposition which you

have to Mr. Devlin in answer to that question you

said, "No, I never went around the place. "Q. You

did not? A. No, sir." Did you give that testi-

mony?

Mr. HEWITT.—We object to that question as

being immaterial, irrelevant and incompetent, and

that no foundation has been laid therefor, and that

if any questions concerning the conversations which

have taken place between defendants at any point

are to be submitted to him, the whole of the conversa-

tions must be submitted.

Mr. MACOMBER.—Q. Answer the question, Mr.

Scheiber. A. How *you* you mean? Read it over

again. [321]

(Testimony of Morris Scheiber.)

(The last question repeated by the reporter.)

A. I don't remember that.

Q. You do not? A. No.

Q. Now, then, whether or not you did make that statement, is that statement true or not? A. I did not go around that ranch with her.

Q. You did not go around with her? A. I did not go all around the ranch with her.

Q. Did you give this testimony:

“Q. Did you have any conversation with her or say anything about the river being one of the boundaries of the place? A. I said the land goes over the levee.

“Q. Did you mention the river? A. I cannot tell.” Did you give that testimony?

Mr. HEWITT.—We make the same objection. A. I don't remember anything about that.

Mr. MACOMBER.—Q. You don't remember whether you gave that or not? A. No.

Q. Now, Mr. Scheiber, at this time that you speak about, that you told her that the land went over the levee, who was with her at that time? A. My brother, Joe.

Q. He was with you at the time? A. Yes. Q. Who else was along?

A. Well, there was nobody just present there.

Q. Just you and your brother Joe and Miss Garwood? A. Yes. Q. What kind of a conveyance was she in? A. She was seated in a surrey there.

Q. Who was driving the surrey? A. I don't know. I guess my brother brought her over in the surrey.

(Testimony of Morris Scheiber.)

Q. It was down on the county road? A. It was right near the county road there, yes. Q. When you told her that, what did she say? A. When I showed her the line, you mean? [322] Q. When you told her it went over the levee. A. She did not say anything. Q. After she bought the ranch, did you ever talk about it then, about where her land ran to? A. After she had the ranch? Q. Yes. A. After she was in possession? Q. Yes. A. No. She was on the ranch a while afterwards, maybe a week or so afterwards, and I brought her to the Strickland station, to the Northern Electric station, and we were just talking about business there, that is all, about cows and horses and such things as that. Q. Did you at that time tell her anything about the land and its boundaries? A. I showed her the boundaries there. Q. At that time? A. At that time, out there.

Mr. MILLER.—Q. Do you mean the first time you saw her on the ranch you showed her the boundaries? A. The first time I saw her on the ranch I did. That means afterwards, when I brought her out to the Strickland station.

Mr. MACOMBER.—Q. Then you pointed them out again when you went to the Strickland station? A. I didn't point it out. We just went along the road and she seen the line that I showed her there. She was in possession at that time.

Redirect Examination.

Mr. MILLER.—Q. Mr. Scheiber, on the occasion referred to in Mr. Devlin's office, when they were questioning you there, didn't they ask you these

(Testimony of Morris Scheiber.)

questions, and didn't you make these answers: "Q. Did you say—referring to the boundary—it was the levee or the river or the fence, or anything of that kind? A. The west boundary, I said, come over to the river." Did you tell her that at that time? A. I remember telling her. Q. What is your recollection about being asked this question and giving this answer— [323] A. It is over to the river, I told her that.

Mr. MACOMBER.—You are reading from the same depositions?

Mr. MILLER.—I don't know whether I am reading from the same depositions or not. I am asking him some questions.

Q. Mr. Scheiber, you said that some time later, that is, after the first time you saw her on the ranch, some time later than that you either took her to Strickland station or brought her from Strickland station. A. I took her to Strickland station. Q. That was some weeks after the first visit, was it? A. That was some weeks after she was in possession already, after the first of December.

Q. After the first of November? A. After the first of November. Q. First of November, you mean? A. Yes. [324]

### **Testimony of John Scheiber, for Defendants.**

JOHN SCHEIBER, called for the defendants, testified as follows:

Mr. MILLER.—Q. Your name is John Scheiber? A. Yes. Q. You are one of the defendants in this action, are you not? A. Yes. Q. You and your two

(Testimony of John Scheiber.)

brothers owned the property that you sold to Miss Garwood? A. Yes. Q. You remember her coming up to the ranch? A. Yes. Q. She came up to the ranch to look at the property before you made any contract with her, did she not? A. Yes. Q. Do you know how many times she was there altogether? A. Altogether, she was there three times. Q. Before the deed was made? A. Yes. Q. Did you also meet her and talk to her and Dr. Ramos and others in Mr. Dike's office before the contract was signed? A. Yes. Q. After that, did you go to Mr. White's office and sign the contract? A. Yes. Q. Now, on all those different times that you saw her before the contract was signed and afterwards, there was some talk about the place, was there not? A. Yes. Q. Is your recollection very good as to what those conversations were? A. Some of them. Q. Some you remember very well? A. Yes. Q. Some you do not remember very well? A. Some I do not remember very well. Q. When you talked about the place, or anybody else talked about the place in your presence, did they tell the truth about it? A. Yes. Q. Did you try to keep anything from her at all? A. No. Q. She was shown the place, was she? A. Yes. Q. Did anybody, either you or your brothers, or anybody else in your presence, tell her that there were 600 acres of alfalfa land? A. No. Q. Did anybody in your presence tell her that it was all clear level land? A. No. Q. Was there anything said by anybody about the number of acres there were in the place? A. Well, we told her what the deed says, 600 acres

(Testimony of John Scheiber.)

more or less. Q. Was there anything said about it [325] never having been surveyed? A. We never had it surveyed. Q. Was that said to her? A. We never had it surveyed, yes. Q. You never had had it surveyed? A. We never had had it surveyed. Q. You didn't know exactly how many acres there were, did you? A. No, we did not.

Mr. MILLER.—Is it claimed, Mr. Macomber, that this "Plaintiff's Exhibit 5," the circular, was given to Miss Garwood by the defendants, or any one of them personally?

Mr. MACOMBER.—It was given her by Dike at the California Colonization Company, I think.

Mr. MILLER.—In the question you asked, you said the defendants gave it to her, but you meant Dike, I think. I just wanted to have that cleared up.

Mr. MACOMBER.—Who gave it to you, Miss Garwood?

Miss GARWOOD.—Dike gave it to me, at the California Colonization Company's office.

Mr. MILLER.—Q. Mr. Scheiber, I show you a paper, a pamphlet or circular, marked "Plaintiff's Exhibit 5." Did you ever see that before you were in court, in this courtroom? A. No. Q. Did you ever tell Miss Garwood or anybody else, that that land was not subject to overflow? A. No. Q. Did you ever tell her that that land was all subirrigated? A. No. Q. Did anybody else in your presence ever tell her that that land was all subirrigated? A. No. Q. If anybody had misrepresented the facts about

(Testimony of John Scheiber.)

the place in your presence, you would have known it, would you not? A. Yes. Q. You know that everybody told the truth about that, that you heard? A. Yes. Q. And you yourself did the same? A. Yes. [326]

Cross-examination.

Mr. MACOMBER.—Q. Mr. Scheiber, you are Mr. John Scheiber? A. Yes. Q. You remember the occasion when Miss Garwood first came up there with Mr. Dike? A. Yes. Q. Who all were in the party? A. Miss Garwood, Mr. Ramos, Mr. Dyke and the driver. Q. Now, do you remember what day of the month it was? A. I do not. Q. Do you remember what day of the week it was? A. I do not. Q. How many times was Miss Garwood on the ranch before you met her at Dyke's office in Sacramento the first time? A. Twice. Q. She was on the ranch twice before she signed the contract? A. Yes. Q. Are you positive? A. Yes. Q. How many days after her first visit to the ranch was it that she made her second visit to the ranch? A. I could not tell. Q. Can you tell about how many days? A. No, I cannot. Q. Was it two weeks? A. I could not tell. Q. Would you say whether it was a week or two weeks? A. No, I could not say. Q. Did you see her both times? A. Yes. Q. You are positive of that? A. Yes. Q. Did you talk with Miss Garwood the first time she was on the ranch? A. I did. Q. Did you say anything to her about the land being all level? A. No. Q. Did you say anything about the land at all? A. I did not say much about the land.

(Testimony of John Scheiber.)

Q. You did not say much about the land? A. No.

Q. Your brother Morris was not there that first day that she called? A. No.

Q. She did not ask you any questions about the land? A. Yes, she did.

Q. What did she ask you? A. Well, she asked me how much alfalfa we got.

Q. Did she ask you anything else? A. She asked about the lines.

Q. What did she ask you about the lines, and what did you tell her about the lines? A. I pointed out here as good

as I could, along Schwalls, Martin Schwalls, and along Johnnie Schwalls, along young John Schwalls,

and along Mays and [327] along Phil Dreschers, along the old Redfield place over the levee out to the

river. Then I started on Saylor's, along Saylor's, along the County Road, along Claus Peters, over the

levee clear over to the river. That is the way I pointed it out.

Q. But you did not say anything about the character of the condition of the land over on the other side of the levee? A. Well, she could

see that. I told her there was some timber there.

Q. You say she could see that? A. She could see the timber there.

Q. She could see the tops of the trees over the top of the levee from where you were talking? A. Yes.

Q. You were standing there at the ranch house when you were talking? A. At the

house, on a kind of a mound.

Q. You were standing near where George Duff is living at the present time, at the ranch house? A. We were standing there,

and in the corral, near the barn, on that mound.

Q. When did Miss Garwood first say anything to you about the land on the other side of the levee? A.

(Testimony of John Scheiber.)

How is that? Q. When did Miss Garwood first say anything to you about the land on the other side of the levee—when did she first say anything to you about it? A. She never talked to me much about the land outside of the levee. Q. What did she say? A. She said “What is that land out there good for?” I said “It is good for wood.” Q. How long after the sale was that?

Mr. MILLER.—That is assuming it was after the sale. We object to the question on the ground it assumes a fact not in evidence.

Mr. MACOMBER.—Q. You told her at the time you were talking with her at the ranch house that day that the land went over the levee to the river? A. Yes. Q. You did not tell her how far the river was away from the levee? A. I could not tell her how far it was; I didn’t know how far it was. Q. You didn’t say anything about how far it was? A. I said clear over to the river; that is, [328] all I said. Q. You never said anything to her about the land—you never told her that the land was free from overflow? A. No. Q. You did not talk about the land overflowing? A. I don’t know whether I did or not at that time. Q. You never told her about any land underneath the river, of course? A. What? Q. You never told her that there was any land underneath the river? A. No, I did not tell her underneath the river. Q. What are you doing at the present time, Mr. Scheiber? A. Dairying. Q. Where do you dairy? A. On the old Redfield place. Q. What is your brother Morris doing? A. My

(Testimony of Joe Scheiber.)

brother Morris is on the Claus Peters' place. Q. He got that place since you sold the Nicolaus place?

A. Yes. Q. He bought that since? A. Yes. Q.

Now, you never represented that the land contained exactly 600 acres? A. No. Q. You told her that there were 600 acres, more or less? A. Yes.

**Testimony of Joe Scheiber, for Defendants.**

JOE SCHEIBER, called for the defendants, testified as follows:

Mr. HEWITT.—Q. Mr. Scheiber, you are one of the defendants in this action? A. Yes. Q. Where were you born? A. Switzerland. Q. When did you come to this country, how long ago? A. About 26 years ago. Q. Did you go to school in Switzerland? A. I hardly had any schooling. Q. Did you go to school after you came here—have you ever been to school in America? A. No. Q. When did you first meet the plaintiff, Miss Garwood? A. On the Nicolaus Ranch. Q. When, what year? A. 1911. Q. In September of that year? A. Yes. Q. Previous to your meeting her there, had you any communication with any parties, any talk with any parties in Sacramento concerning the sale of the property? What I mean is this: did you [329] talk with Mr. Dyke or anybody else over the 'phone prior to her coming there to the ranch? A. Yes, I did. Q. Were you called up on the 'phone? A. Yes. Q. Who called you up? A. Mr. Dyke. Q. Where were you talking over the 'phone, in your house? A. My brother Johnnie, he was there. Q. Was it in your house? A. In my room inside. Q. What

(Testimony of Joe Scheiber.)

did he want to know? A. He asked me if we got our place for sale and I says "yes, it is for sale, if we get our price then we sell the place, and the personal property has got to be sold too." Q. Did you tell him what the price was? A. Yes. Q. How much? A. \$75,000. Q. Did he ask you then if you found a purchaser whether you would give him a commission for selling it? A. Yes. Q. Did you agree to do it? A. Yes. Q. Your brother John was in the room at the same time? A. At the same time. Q. How long after that was it before you saw Miss Garwood, if you can remember? A. Well, I think they came up the next day; I could not tell you any more than that; I could not tell which day it was. Q. It was shortly afterwards, was it? A. Yes. Q. Who came with her? A. Mr. Dyke, Mr. Ramos, Miss Garwood and the driver. Q. Did she come there to the ranch? A. Yes. She looked over the ranch, looked all over the buildings. Q. Was it you that gave her a buggy ride? A. Yes. Q. Where did you drive her in your buggy or surrey, whatever it was? A. I drove her over the alfalfa land. Q. Was that the first time that she was there or the second time that she was there? A. When I drove her over that was the second time. Q. Now, where did you drive her in your buggy? A. Well, I drove her through the alfalfa land there, and we went down and looked the alfalfa over, and I pointed the line out and she seen the cows there, and we went over to the old barn, to the levee there, looked all around. Q. Did you show [330] her the lines? A. Yes.

(Testimony of Joe Scheiber.)

Q. Were the lines pointed out to her, the correct lines? A. Yes. Q. When you drove her around in the buggy, were you alone with her, that is, when you were driving? A. Yes. Q. Nobody else in the buggy but you and Miss Garwood? A. That is all. Q. Did you meet your brother Morris at that time when you were driving in your buggy? A. Yes. Q. Where did you meet him? A. I met him over there by the old barn; he came in. Q. Did she ask anything there about the boundaries of the place? A. Yes, she did. Q. What was said to her? A. Well, Morris, he told her the boundary line ran there along Claus Peters', over across the levee, clear out to the old Feather River. Q. He represented the Feather River as being one of the boundaries of the place? A. Yes, he did. Q. Did you tell her that there were 600 acres in the ranch? A. No. Q. What was the conversation with reference to that? A. How do you mean? Q. What was your talk about that? A. Well, we looked the land over, and there was a pile of wood there we had piled up, that we had, and we were talking of one thing and another, showing her everything. Q. But about the acreage, you say you did not tell her there was 600 acres? A. No. Q. Did she ask you how many acres there were in the place? A. Yes, she did. Q. What did you tell her or what did Morris tell her in your presence? A. He told her there was 600 acres more or less, what the deed says,—we never had it surveyed, we sell it the way we bought it. Q. You sell it the way you bought it? A. Yes. Q. Now, about the wood, what

(Testimony of Joe Scheiber.)

did you tell her about the wood? A. We had a pile of wood there, and we were talking about the wood, and she said, "What is that land out on the other side of [331] the levee good for?" Morris told her it was good for wood, that is the place where we got the wood. She says "Is there a market so a person can sell wood," and I says, "Yes, people come in from the plains in the fall and buy wood." Q. Could you see the wood lot from the buggy? A. The timber, you mean—the wood lot, what is that? Q. Where the trees grew there over the levee? A. Yes. Q. She had dinner at the place or ranch at one time when she was there, did she? A. She had dinner the first time, and had dinner the second time. Q. Both times? A. Both times. Q. Did she walk around the place any at that time? A. Yes, she did. Q. Where did she walk? A. The first time she walked around the buildings there and looked all the buildings over and barn, and through the corrals—through the yard—she looked everything over. Q. Walked from the house to the barn? A. Yes. Q. How far is it? A. It is about 300 or 400 steps, I think. Q. Was she lame at that time? A. No. Q. Walked right along readily, did she? A. Yes. Q. The second time that she was there, was she lame? A. No. Q. Did she walk around the place any then? A. Yes. Q. Were you present when Mr. Dyke asked her to go up on to the levee and look at the land on the other side of the levee—do you remember his asking her, or don't you? A. Yes. Q. She did not go up on the levee to look at it, did she, or don't

(Testimony of Joe Scheiber.)

you know? Let me ask you again, to see if you understand; did you hear Mr. Dyke ask her to go up on the levee and look at the land over on the other side of the old levee? A. Yes. Q. You heard that? A. Yes. Q. Now, did she go up on the levee? A. No. Q. Now, have you at any time since you purchased that place from the Pacific Mutual Life Insurance Company sold any part of it—did you sell any part of it [332] off before you sold to Miss Garwood other than for roads? A. Just roads. Q. Just the road? A. We had to sell the roads. Q. The roads you sold? A. Yes. Q. Did you sell any other part of the Allgier Ranch? A. No. Q. You sold to her all that you bought? A. We sold all the land we bought to her except the roads. Q. How many times was she up there on the ranch before you went down to sign the agreement? A. The contract you mean? Q. The contract. A. Two times. Q. Did you go to Sacramento? A. Not before. Q. Did you go to Sacramento after the second time that she was up there? A. Yes. Q. Where did you go? A. We went to Mr. White's office. Q. Where did you go first? A. Dyke's. Q. That is the Colonization Company's office? A. Yes. Q. Did you meet the plaintiff there? A. Yes. Q. Did you hear any conversation there with the plaintiff about the acreage in the Garwood place? A. At Dyke's office. Q. Did she talk with you or did she ask any questions about how many acres there were in the place in Dyke's office? A. Yes. Q. Did she ask you or was it somebody else?

(Testimony of Joe Scheiber.)

A. She asked Morris. Q. Were you present? A. Yes. Q. What did Morris tell her? A. He told her 600 acres more or less, what the old deed says; we never had it surveyed and we sell the place the way we bought it. Q. Did you see Dr. Ramos? A. Yes. Q. Did you ever know about his getting any commissions or any part of the commissions that you agreed to give Dyke for selling the place? A. No. Q. You heard of it some time after the deed was made, didn't you? A. I heard it afterwards. Q. Now, in Mr. White's office, was anything said there when you went to draw the contract, about the acreage in the place—about the number of acres in the place? A. Yes. Q. What was said there? A. Morris told her 600 [333] acres more or less, what the old deed says, we never had it surveyed, we sell it the way we bought it. Q. Did you ever tell her that it contained 600 acres of the finest alfalfa land? A. No. Q. Did you ever tell her that it contained 300 acres of the finest alfalfa land in California? A. No. Q. Did anybody else tell her in your presence that the ranch contained 600 acres of the finest alfalfa land? A. No. Q. Did you have any conversation with her or did you tell her anything about some of the land being overflowed? A. Yes. Q. What did you tell her? A. I told her the lower land when the back water come up real high grows under water, all the lower land, lower part of the land, when the river breaks above, then the water comes over the land too, over the alfalfa. Q. Did that come over the land every year? A. No. Q. When was it that you had

(Testimony of Joe Scheiber.)

this conversation, when did you tell her that? A. I told her right at the house, by my house. Q. Was that before the contract was signed? A. Yes, that was the first time when she was up there. Q. When you were with her in the buggy driving about the place did you show her the boundaries, the lines? A. You mean when it was? Q. When you were with her in the buggy when you were driving her about the place did you show her the lines? A. Yes. Q. What was the object of your taking that buggy ride with her? A. I wanted to show her the lines and everything, what a man ought to show her; a man has got to show that. Q. Did you ever tell her anything about that place that was untrue, that was not the truth—did you ever tell her anything about that place that was untrue? A. No. Q. Did anybody else in your presence ever say anything to her about the place that was untrue? A. No. Q. What did you use the back land for? A. For pasture. Q. Was it plowed [334] at the time she was there? A. No. Q. Did you drive her around where she could see the back land in that buggy? A. Yes, she saw the back land from the house. Q. You could see it from the house? A. Yes. Q. Did anybody point out the boundaries of the place from the house to her? A. I did. Q. You did? A. Yes. Q. Were the boundaries pointed out by you at that time the right boundaries? A. They were pointed out both times. Q. Were they the right boundaries? A. Yes. Q. Now, did she say anything to you in any of those conversations about wood? A. Yes, Q. I

(Testimony of Joe Scheiber.)

mean to you, did she say anything to you about wood directly? A. Just what I heard over there, what Morris said. Q. Did you hear her talk with anybody else or anybody talk with her about wood? A. No. Q. You did not hear that? A. No. Q. You did not hear her talk with Morris about wood, or John? A. I heard her talk with Morris. Q. You did hear her talk with Morris? A. Yes. Q. I meant anybody, I mean your brothers as well as strangers? A. I didn't understand the question. Q. What was said about that? A. Well, she says "What is that land good for out there on the other side of the levee," and Morris says, "That is the place where we get the wood." She says, "Is there any sale for wood around here," and Morris says "Yes, you can sell the wood in the fall to farmers—they come in from the plains and buy wood down here." Q. Were you up there in Mr. White's office when the contract was signed? A. Yes. Q. And the contract was read over? A. Yes. Q. Did she say anything to Mr. White to the effect that she was buying 600 acres of the finest alfalfa land in California, or anything of that kind? A. No. [335]

Cross-examination.

Mr. MACOMBER.—Q. About the land where you got the wood you told her there was lots of wood out there, did you, Mr. Scheiber? A. I didn't tell her there was lots of wood out there. Q. What did you tell her? A. I told her there was land outside of the levee. Q. You told her there was lands outside of the levee? A. Yes. Q. You told her—you

(Testimony of Joe Scheiber.)

pointed out the correct lines? A. Yes. Q. You pointed out the correct lines all the way around the ranch? A. Yes. Q. And she saw where the lines went all the way around the ranch? A. She could not see the river. Q. No, but you gave her to understand that there was about 150 acres outside of the levee? A. I did not say how much; I could not say. Q. You could not say? A. No. Q. What was the first time Miss Garwood spoke to you about the ranch being short? A. Oh, that was about 8 or 9 months after we had sold out. Q. Some months after you sold the ranch to her she came around and said the land was short? A. Yes. Q. Now, you say you told her that the back land overflowed? A. Well, the back land, outside of the levee, sometimes the alfalfa gets overflowed when the river breaks out. Q. Did you tell her that the back land overflowed, I mean the back land, the quarter section? A. Yes. Q. How did you come to tell her that? A. Well, I told her; I wanted to tell her the truth. Q. You wanted to tell her the truth? A. I told her that. Q. So you told her that? A. Yes. Q. You didn't want any misrepresentations? A. No. Q. So you just gave her to understand that that back land overflowed? A. Yes. Q. She never knew anything about overflow before that? A. I don't know. Q. She never asked anything about it? A. No. Q. You simply voluntarily told her that yourself? A. Yes. Q. You met her there the first time at your place when she came up with Dyke [336] and Ramos? A. Yes. Q. And you talked with her

(Testimony of Joe Scheiber.)

there, at the ranch house? A. Yes. Q. And you pointed out the lines from the ranch house there? A. Yes. Q. And pointed out the true boundaries? A. The true boundaries—that means the right lines? Q. Yes. A. Yes. Q. Now, you did not tell her that there were any 600 acres exactly? A. No. Q. You told her there were 600 acres more or less? A. 600 acres more or less; the way the old deed says, we never had it surveyed; we sell it the way we bought it. Q. Now, you say the first time she came up you took her around all the ranch? A. No, not the first time. Q. I understood you to say in answer to Mr. Hewitt's question you took her around the first time? A. The second time. Q. Did you say you heard Mr. Dyke ask her to come up on the levee? A. Yes. Q. Where were you? A. At the old barn. Q. Down near the levee? A. Yes. Q. When was that? Was that the first time or second time she came up? A. The second time. Q. That was the second time she came up; you are sure of that? A. Yes. Q. Now, what month was the second time she came up there? A. I could not remember any more; it is pretty near four years since we sold the place, and I can't remember. Q. How long after the first visit was it that she came up, how many days? A. I could not tell you that. Q. Was it two weeks? A. I could not tell you. Q. Just about, how long about? We do not want to get it exact, but about how long.

Mr. MILLER.—If you can't remember you can't remember.

Mr. MACOMBER.—Q. You cannot say whether

(Testimony of Joe Scheiber.)

it was one week or whether it was three weeks or whether it was one day? A. I could not say.

Mr. MILLER.—We object to the question. [337]

Mr. MACOMBER.—We want to get the witness's best recollection; we do not want to pin him down at all. Q. Was it a month, Mr. Scheiber?

Mr. MILLER.—You mean between the first visit and the second visit?

Mr. MACOMBER.—Between the first visit and the second visit. Let me examine the witness. Q. Was it a month Mr. Scheiber, from the time she came up there the first time to the time she came up there the second time? A. It could not be a month.

Q. Was it two weeks? A. Maybe, I don't know.

Q. Maybe two weeks; all right. You say that when Dyke telephoned one night or one day and you and your brother Joe were on the line he asked you if the ranch was still for sale; is that true?

A. Yes. Q. And you told him yes, that the price was \$75,000? A. Yes. Q. You told him he could

go ahead and sell for the commission; is that right?

A. Yes. Q. How long after that did Dyke take the woman up there? A. Well, I could not tell;

it might be a day or two. I could not tell that any more. Q. You couldn't tell how many days; it

was several days, was it? A. I could not tell. Q.

Was it a week? A. No. Q. It was not a week?

A. No. Q. Was it 5 days? A. I could not tell.

Q. You could not tell? A. I could not tell; I could not tell it to anybody. I could not tell because I

don't know. Q. We do not want you to tell anything

(Testimony of Joe Scheiber.)

that is not true. Q. Miss Garwood, the first day she came up there, was she lame? A. No. Q. She was not lame at all? A. No. Q. She walked around with you all right, did she? A. She walked around all right. Q. You remember the time when you were at Mr. White's office with Miss Garwood, at the time you signed the contract? A. Yes. Q. You say that Miss Garwood [338] did not interrupt Mr. White when he read the contract?

Mr. MILLER.—We have not testified to that at all.

Mr. MACOMBER.—Q. Mr. White read the contract to Miss Garwood, you remember that? A. Yes. Q. When he said 600 acres, more or less, did Miss Garwood say "Stop right there, Mr. White, I am not buying more or less, I am buying 600 acres of fine alfalfa land." Did she say that? A. No. Q. She did not say that at all? A. No. Q. You are sure? A. I am sure. Q. You are positive? A. I am sure. Q. Did she say anything about more or less at all? Did Miss Garwood say anything about more or less? Did she ask what more or less meant? Did Miss Garwood ask Mr. White what more or less meant? A. I can't remember that. Q. You can't remember? A. No. Q. Did you or Morris at that time tell them that you were selling 600 acres, more or less? A. Yes. Q. You told them you were selling 600 acres more or less? A. Yes. Q. How did you tell her, what were your exact words? A. She asked me how many acres was in the place. Q. Yes. A. And I says 600 acres

(Testimony of Joe Scheiber.)

more or less. We never had it surveyed, that is what the old deed said. Q. Those were your exact words to her? A. That is what I told her. Q. What else was said there at that meeting, do you remember, Mr. Scheiber? Do you remember anything else that was said there at that time? A. No, I can't remember it right now. Q. You can't remember? A. No. Q. How long have you been on the ranch, Mr. Scheiber? A. About 18 or 19 years. Q. That is 19 years before you sold it to Miss Garwood? A. Yes. Q. Now, were you there in Nicolaus, around there at the time the levee broke in '92? A. No, I was not in Nicolaus then. I was around Sacramento. *was around Sacramento.* Q. When did you first go to Nicolaus? When did you [339] first go there, can you remember? A. I can't remember that any more. Q. Can you remember what year it was when you first went on the Nicolaus Ranch? A. No, I can't remember that either. Q. Do you remember when the levee broke in '92? Do you remember when the levee broke and Bill Ewen's pigs were all floating over the fence? A. I remember when the levee broke, but I can't remember what year. Q. Do you know as a matter of fact that before the levee broke there used to be on the Nicolaus Ranch land that went out on the Nelson Bend? A. I didn't know the ranch much then. Q. You don't remember the land much then? A. No. Q. You say you never had the land surveyed before you sold it? A. No. Q. Now, did you ever know about any land that was away

(Testimony of Joe Scheiber.)

over under the river over by the Nelson Bend?

Mr. MILLER.—Do you mean land that was overflowed at high water?

Mr. MACOMBER.—Overflowed land, outside of the old levee? A. How do you mean? Q. Well now, here is what I mean. You know the river used to run around the Nelson Bend? A. Yes. Q. You know the river runs straight now? A. Yes. Q. You understand? A. Yes. Q. Now, the river used to turn around and go up around the bend, around the Nelson Bend; isn't that true? A. I guess so. Q. Now, there used to be a lot of land that ran along the river when it went around the bend; isn't that true? A. There used to be lots of land before, you mean? Q. Yes. A. Well, there was land before, I think. Q. Well now, on this map— A. (Intg.) You don't need to show me a map; I don't know anything about maps. Q. I guess it is immaterial anyway. As a matter of fact do you know—answer this yes or no—do you know whether or not there was a lot of land that went away off by Nelson's Bend? A. There was some land there, I know that. Q. There used to be? A. Used [340] to be, that is what I heard. Q. You heard that? A. Yes. Q. But there was not at the time you sold it? A. Yes, there was some land there. Q. But there was a whole lot that was gone? A. How would that be gone? That is there yet. Q. How is that? A. The place can't be gone; the place would be there yet. Q. Did you ever see it there? A. Yes, I saw it. I was out and I seen it. Q. You saw

(Testimony of Joe Scheiber.)

it down through the water—did you look down through the water to the bottom?

Mr. MILLER.—That is assuming he was looking at it at a high water.

Mr. MACOMBER.—Q. Were you looking at it at high water or low water? A. I don't know any more what the height of the water was; I don't know how it looks. Q. You know there used to be more land to that ranch than there was when you sold it?

Mr. MILLER.—We object to that as assuming a fact not in evidence? A. Yes.

Mr. MACOMBER.—Q. That is true? A. That is true. Q. Do you know whether or not this woman knew about that land being gone when she bought the place? A. I don't know whether she knew that, or not. Q. You did not point out to her across the river where there was any land? A. I pointed the lines. Q. She never went upon the levee? A. Not that I seen. Q. You were out driving with her, were you? A. Yes. Q. You never drove her over the levee, did you? A. No, I did not drive over the levee. Q. Why didn't you drive her over the levee? A. You could not drive over there, too rough, too steep. Q. Wasn't there a road up on the levee there? A. We used to have a road there; we had been hauling wood out, but that was not a road to go on with a lady like Miss Garwood with a buggy; it was not a road good enough to go out with a buggy. Q. You [341] could go over it all right? A. We might have tipped over if we went over there. Q. You did not want any misrepre-

(Testimony of Joe Scheiber.)

sentations on this deal? A. No. Q. You did not want any misrepresentations? A. No. Q. You wanted her to understand just where it was? A. Yes. Q. If that was the case, so that she would not be misled, you told her that the back land down there, in the back overflowed from the water from the tules, didn't you? A. Yes. Q. So that she would understand it perfectly? A. Yes. Q. Why didn't you take her on the levee and tell her that there was some land under the river?

Mr. MILLER.—That is assuming there was some land under the river.

Mr. MACOMBER.—Q. Why didn't you show her how the land was just outside the old levee, Mr. Scheiber? A. She never asked me to go over there. Q. She never asked you, so you didn't take her? A. I never thought of it; she did not ask me to go. Q. You did not tell her how much land there was over the levee? A. No. Q. You didn't say how much? A. No. Q. By the way Mr. Scheiber, did you ever offer to buy any land back from Miss Scheiber?

Mr. HEWITT.—I object to that as immaterial and not proper cross-examination. A. No.

Mr. MACOMBER.—Q. You never asked to buy any back? A. No. Q. Didn't you ever tell her you would give her \$125 an acre for the 100 acre field? A. No. Q. You never offered to buy any part of it back. A. No. Q. In reference to this back and being subirrigated, did you tell her anything about that? A. No. Q. You didn't want her

(Testimony of Joe Scheiber.)

to misunderstand anything, did you?

Mr. HEWITT.—I do not think the witness understands.

Mr. MACOMBER.—Q. You did not want her to misunderstand anything? A. No. Q. Did you tell Miss Garwood anything about the [342] back land at all? A. Yes, I told her that back land, we used it for pasture. Q. Did you tell her the back land was just as good for alfalfa? A. No, I did not tell her that. Q. Did you tell her that it was not as good? A. I told her that it was not as good as the front land. Q. You told her it was not as good? A. Yes. Q. What did you say? A. The front land raises about 5 to 6 crops of alfalfa and the back land about 3 or 4. Q. You told her that, did you? A. Yes. Q. You told her that the back land was not anywhere as near as good as the front land? A. Yes, we told her that. Q. Did she ask you why it was not as good? A. She did not ask me. Q. She never asked you anything about some of the land not being as good as others at all—she never asked you anything about that at all, about some of the land not being as good as the front land? A. I guess she did. We told her the front land was the best; the back land is not as good as the front. Q. How did you happen to tell her that? A. Well, I wanted to tell her everything. I didn't try to cheat her.

Q. Did you ask Miss Garwood if she wanted to buy the other 140 acres at the time Miss Garwood was up there?

Mr. HEWITT.—What other 140?

(Testimony of Joe Scheiber.)

Mr. MACOMBER.—That is the Redfield farm?

Mr. HEWITT.—We object to that as not being cross-examination and as being immaterial, irrelevant and incompetent. A. I did not.

Mr. MACOMBER.—I was just testing the memory of the witness. Q. You did not say anything to her about buying the other 140 acres

Mr. MILLER.—You mean the Redfield farm?

Mr. MACOMBER.—The Redfield farm. A. I can't remember. Q. You can't remember? A. No. [343]

#### Redirect Examination.

Mr. HEWITT.—Q. Mr. Scheiber, did you go on to the land when the boys did, or afterwards—when you bought the land or when you leased it from the Pacific Mutual Life Insurance Company, did you go on to the ranch the same time that your brothers did, and go to work? A. Yes. Q. Now, the break in the levee that Mr. Macomber referred to, was that before you bought it or after you bought it? A. Before. Q. When you bought the land from the Pacific Mutual Life Insurance Company did you consider that land west of the old levee of any particular value except for wood? You knew it could not be farmed, didn't you? A. Yes. Q. Did you consider it of any particular value except for wood? A. That is about all. Q. Its value was just as much when you sold it as when you bought it, was it not? A. Just as much. Q. You never used it for anything except for wood? A. Just for wood. Q. Did you turn stock in it sometimes? A. Sometimes we

(Testimony of Joe Scheiber.)

let the stock go over there; we let the cattle go all around there.

Recross-examination.

Mr. MACOMBER.—Q. When you bought the land there was no value placed on that outside land. You did not consider that of any value, as Mr. Hewitt says? A. How do you mean? Q. Well, like this; that land outside of the old levee you did not use for anything except wood? A. No. Q. It was no good for anything except for wood? A. Just for wood. Q. That is all. When you paid your money for the good land, did you not pay it for this outside land? What I am trying to get at is this, that in fact the outside land was never good for anything? A. It was good for wood. Q. It was not good for anything else. That is what Mr. Hewitt asked you. You could not use it for alfalfa or anything like that? Do you think [344] you could use it for alfalfa? A. We never used it for alfalfa. Q. Could you use it for alfalfa? A. It could be used if you fixed it; it could be fixed so you could use it. Q. But you never put any value on it except for wood? A. Well, we left the cows go there, too. Q. There wouldn't be any cows there when the river was up? A. We had some cows pasture along the river, and we let the cows go there when the water was out. We used it for wood and pasture. [345]

**Testimony of William H. Saylor, for Plaintiff (in Rebuttal).**

WILLIAM H. SAYLOR, called for the plaintiff in rebuttal, sworn.

Mr. MACOMBER.—Q. You are Mr. William H. Saylor? A. Yes.

Q. You testified, I believe, on direct examination in this case before? A. Yes,

Q. I guess you recognize this map, do you not, as being a map of the district in which your place is situated? A. Yes.

Q. Now, do you recognize this place that I indicate, being right south and west of the Garwood ranch, marked W. H. Saylor? A. Yes.

Q. That is your property? A. Yes.

Q. How long have you owned that, Mr. Saylor? What year did you buy it? A. 1909 or 1910.

Q. You bought it either 1909 or 1910? A. Yes.

Q. How many acres have you there, Mr. Saylor?

A. About 125.

Q. In reference to that land, Mr. Saylor, is there any variation in the quality of the land, and if so, on which line, either north or south, or east or west, does the variation run?

Mr. MILLER.—We object to this as immaterial, irrelevant and incompetent, and not rebuttal; if it is proper, it should have been used as a part of plaintiff's original case, and is not proper at this time—it is wholly immaterial and incompetent anyway.

A. It varies.

(Testimony of William H. Saylor.)

Mr. MACOMBER.—Q. In which direction does the variation run?

Mr. MILLER.—The same objection. A. Well, it depends upon what you base the variation; when you base the variation on the point of moisure, it varies from east to west. The further east you go, the dryer the land becomes, the less subirrigation there is.

Mr. MACOMBER.—Is or is not the greater portion of your ranch subirrigated?

Mr. MILLER.—The same objection. [346]

A. The greater portion. I should qualify that by saying in an average season.

Mr. MACOMBER.—Q. What portion have you placed as not subirrigated?

Mr. MILLER.—The same objection.

Mr. MACOMBER.—We will stipulate that your objection may apply to all of this.

Q. What portion of your ranch is not subirrigated?

Mr. MILLER.—The same objection. A. The eastern portion is subirrigated less than the western portion.

Mr. MACOMBER.—Q. Did you have alfalfa in that recently, Mr. Saylor?

Mr. MILLER.—The same objection.

Mr. MACOMBER.—Q. In that eastern corner of which you speak now?

Mr. MILLER.—The same objection. A. Yes.

Mr. MACOMBER.—Q. Did you or did you not remove that growth of alfalfa? A. I took up a por-

(Testimony of William H. Saylor.)

tion of it. Q. For what reason? A. On account of the lack of growth; it didn't grow as satisfactorily as it should have. Q. So you took it out for that reason? A. I did and put other crops in.

Mr. MILLER.—The same objection.

Mr. MACOMBER.—Q. Other than the variation of which you speak, which you say runs from east to west, is there any other variation in the producing quality of your land?

Mr. MILLER.—The same objection. A. There are a few places where sand is deposited on the ranch. That affects the ability to grow crops.

Mr. MACOMBER.—Q. Does the sand that is on your land interfere with the growing of alfalfa any?  
[347]

Mr. MILLER.—The same objection.

A. We are growing alfalfa on the sandy portions.

Mr. MACOMBER.—Q. What is the difference in the growth of the alfalfa which you get on the sandy portion and that which is not sandy?

Mr. MILLER.—The same objection. A. Well, if we get a sand, now, it is not easy to get alfalfa started in sand, but if the sand is a fair one, with a proper distribution of moisture—if we get a stand on that, so that the roots get through the sand into the soil, you get just as good a crop there as you do on the other land.

Mr. MACOMBER.—Q. Ordinarily, what is the condition in that respect?

(Testimony of William H. Saylor.)

Mr. MILLER.—The same objection. A. What is the condition?

Mr. MACOMBER.—Yes, how does your crop average up on the sand, and that which is not sand?

Mr. MILLER.—The same objection.

A. When you get the stand once, it produces as much alfalfa as the other does.

Mr. MACOMBER.—Q. That is, after the roots get started down into the ground?

Mr. MILLER.—The same objection. A. Yes.

Mr. MACOMBER.—Q. Speaking of your alfalfa crop now as it is at the present time, and your alfalfa growing there, how does the yield per season on the sandy land compare with the yield per season on the land which is not sand?

Mr. MILLER.—The same objection. A. The same, it is the same growth, the same yield. I might say that it comes a little earlier, being warmer land in the spring.

Q. (Mr. MACOMBER.) In respect to the value of the land, in so [348] far as it is affected by sand for the growing of alfalfa, is the sandy portion of any different value than the other portion?

Mr. MILLER.—The same objection.

A. Yes, it is not as valuable as if the sand was not there.

Mr. MACOMBER.—Q. Is there very much of your land that has sand on it? A. No.

Mr. MILLER.—The same objection.

Mr. MACOMBER.—Q. How many acres?

Mr. MILLER.—The same objection.

(Testimony of William H. Saylor.)

A. Probably as much as five acres; it might run up to seven.

Mr. MACOMBER.—Q. It might run from 5 to 7 acres, which has sand on it?

Mr. MILLER.—The same objection. A. Yes.

Mr. MACOMBER.—Q. The sand on those five or seven acres varies, does it, in depth?

Mr. MILLER.—The same objection. A. Yes.

Mr. MACOMBER.—Q. How much does it vary; how does it run?

Mr. MILLER.—The same objection.

A. It varies from only a trace up to probably 18 inches in depth.

Mr. MACOMBER.—Q. With the alfalfa started through it, the yield is just as much?

Mr. MILLER.—The same objection.

A. There is a little portion that I have not tried to put alfalfa on the sand; we use the sand for hauling into the corrals.

Mr. MACOMBER.—Q. But in respect to that which you have used?

Mr. MILLER.—The same objection. A. Yes.

Mr. MACOMBER.—Q. The yield is just as good?

Mr. MILLER.—Same objection. A. Yes.

Mr. MACOMBER.—Q. Is there any variation in the quality of your land in respect to north and south? [349]

Mr. MILLER.—The same objection. A. No.

Mr. MACOMBER.—Q. The quality of your land running north and south is of a uniform producing quality?

(Testimony of William H. Saylor.)

Mr. MILLER.—The same objection.

A. So far as I have been able to observe it.

Mr. MACOMBER.—Q. You have now had it how many years?

Mr. MILLER.—The same objection.

A. Since either 1909 or 1910; I am not positive as to the year exactly.

Mr. MACOMBER.—Q. Mr. Saylor, at the time you bought this land, what did you pay for it?

Mr. MILLER.—Same objection.

A. \$100 an acre.

Mr. MACOMBER.—Q. You paid \$100 an acre?

Mr. MILLER.—The same objection. A. Yes.

Mr. MACOMBER.—Q. On the basis of how many acres?

Mr. MILLER.—The same objection.

A. 127.8 acres at that time.

Mr. MACOMBER.—Q. 127.8 acres? A. Yes.

Q. How long had that place been on the market before you bought it, Mr. Saylor?

Mr. MILLER.—The same objection.

A. I don't know positively; I was told that the parties had offered it for sale for about a year.

Mr. MACOMBER.—Q. It had been up for sale about a year?

Mr. MILLER.—The same objection. A. Yes.

Mr. HEWITT.—We ask that the answer be stricken out on the ground it is hearsay.

Mr. MACOMBER.—Q. Do you know about that of your own knowledge, Mr. Saylor?

Mr. MILLER.—The same objection. A. No.

(Testimony of William H. Saylor.)

Mr. MACOMBER.—Q. How long a time before you bought the land [350] had you been aware of the fact that it was up for sale?

Mr. MILLER.—The same objection.

A. I was told about it about a month before I bought it.

Mr. MACOMBER.—Q. You were advised that you could get it at that price about a month before you purchased it?

Mr. MILLER.—The same objection.      A. Yes.

Mr. MILLER.—We move to strike out all of the testimony on the grounds stated in our various objections. No questions, Mr. Saylor.

**Testimony of H. W. Furlong, for Plaintiff (In Rebuttal).**

H. W. FURLONG, called for the plaintiff in rebuttal, sworn.

Mr. MACOMBER.—Q. Mr. Furlong, you have heretofore testified that you examined the land on this Garwood place? A. I did. Q. You examined the land from one end of the place to the other? A. I did. Q. You classified the soils and you know the value of that land at that particular place?

Mr. MILLER.—We object to this as immaterial, irrelevant and incompetent, not rebuttal, a part of their original case when the witness was on the stand before, and they were given every opportunity to go into every matter that he might have any familiarity or acquaintance with; that if they neglected to avail themselves of that opportunity, it is too

(Testimony of W. H. Furlong.)

late now to do so. We were entitled to have the benefit of this witness' testimony before the court at the time when the judge was here, and we object to the witness being interrogated as to any matter about which he was asked or concerning which he testified when he was on the stand during the plaintiff's case, or about any other matter that is not strictly rebuttal. A. I do. I know the value of that [351] land agriculturally.

Mr. MACOMBER.—Q. Will you state, Mr. Furlong, what in your opinion was the value of the land on the Garwood place, that particular portion of the Garwood place, being the 250 acres next adjoining the old levee to the southeast in the year 1911?

Mr. MILLER.—The same objection, and on the further grounds also that it is immaterial, irrelevant and incompetent, the witness not shown to be competent to testify, no the proper method of fixing the value of lands, or not the proper measure of damages, or of compensation in this case.

A. I should say that the land itself had a value from \$100 to \$115 per acre; with the improvements, its value is perhaps \$125 an acre, not over that.

Mr. MACOMBER.—Q. You refer now to the best lands on the ranch?

Mr. MILLER.—The same objection. A. I refer to the piece of land which you asked me concerning, the 250 acres of land lying close to the Feather River; that is the best land on the ranch.

Mr. MACOMBER.—Q. I will now ask you, Mr. Furlong, in respect to land in the vicinity of Sacra-

(Testimony of W. H. Furlong.)

mento, if a person owns land in the vicinity of Sacramento, four miles south of Sacramento, first-class subirrigated river bottom land, what is it worth?

Mr. MILLER.—The same objection. A. I should have to know the parcel of land, and whether that value was entirely for the carrying on of agricultural crops, or double value if the land was within four miles of the city of Sacramento—there is a speculative as well as an agricultural value.

Mr. MACOMBER.—Q. Assuming for the moment that this land which you have now stated on the Garwood place to be worth at the time [352] plaintiff purchased it between 100 and 125 an acre, I say, assuming that the land were situated about 4 miles south of Sacramento, what would you say would be its value?

Mr. MILLER.—The same objection, not a proper hypothetical question, and assuming something that is not in evidence and cannot be a fact in this case.

A. I would say that its value would range, under the circumstances you suggest, properly or equally reclaimed with that land in district 1001, it would be worth from \$250 to \$300 an acre; not all by virtue of its agricultural possibilities, but by reason of its proximity to a city of 75,000 inhabitants; the speculative value that goes with any piece of land, whether it be good agricultural land, or just land in the vicinity of a large town.

Mr. MACOMBER.—That is all.

(Testimony of D. R. Redfield.)

Mr. MILLER.—I move to strike out the testimony of the witness on the grounds stated in our objections.

**Testimony of D. R. Redfield, for Plaintiff (in Rebuttal).**

D. R. REDFIELD, called for the plaintiff in rebuttal, sworn.

Mr. MACOMBER.—Q. What is your full name, Mr. Redfield? A. D. R. Redfield, Q. Where do you reside? A. Nicolaus. Q. What is your business? A. Farming. Q. How long have you resided in the vicinity of Nicolaus? A. Ever since '52, the 27th of April. Q. Ever since '52? A. Yes. Q. Have you ever seen the owner of a certain tract of land in that vicinity which is now known as the Redfield farm, or for a great many years was known as the Redfield farm? A. Yes, I owned a two-thirds share. Q. When did you own the Redfield farm—you do not have to be exact to the day. A. I think my father died in 1908, if I am not mistaken—no, 1898, somewhere along there. Q. When did you sell the Redfield farm? [353]

Mr. MILLER.—That is objected to as immaterial, irrelevant and incompetent, not rebuttal, if any evidence at all a part of the plaintiff's case in chief, but on a collateral matter not in any way involved in this case and cannot become involved in this case. If any questions were asked by counsel about the Redfield farm, he is bound by the answers; they are wholly collateral to the matter at issue.

Mr. MACOMBER.—Q. In reference to the state-

(Testimony of D. R. Redfield.)

ment of counsel, I will state that one or two of defendant's witnesses gave his testimony in reference to what the Redfield farm was sold for.

Mr. MILLER.—You are bound by it; you asked them the question. You cannot go into collateral matters outside of this record and ask them about other places and try to dispute them after they have given their answers.

Mr. MACOMBER.—Very well, we will have a ruling on it at the time the testimony is read. Read the question.

(Last question read by the reporter.)

A. About ten years ago. Q. Where is the Redfield farm situated with reference to the Nicolaus Algier place, what was formerly known as the Nicolaus Algier place, which is now the Garwood place? A. Well, about northeast. Q. Is it or is it not directly adjoining? A. It is adjoining. Q. What is the character of the soil and general agricultural value of the land—how is it situated with reference to the Garwood place?

Mr. MILLER.—The same objection.

A. Just about the same.

Mr. MACOMBER.—Q. Is it the same or is it not the same general character of land? A. About the same. Q. Does it extend back from the river as far as the Garwood place; in other words, what I mean is this, is it as long, is the tract as long away from the old levee as the Nicolaus place is? A. It is pretty near—I think that it is—it is about the same. Q. Now, when you say it is about the [354] same,

(Testimony of D. R. Redfield.)

you do not include the quarter section—do you or do you not include the quarter section on the Garwood place?

Mr. MILLER.—We object to the question on the same grounds.

Mr. MACOMBER.—In order to refresh your memory, we will show you a map which is in evidence in this case. This point here which I am now directing your attention to is the Redfield farm, and this is the Garwood farm. A. Well, it don't extend back as far as the Garwood place, but it joins on. Q. Mr. Redfield, are you familiar with land values, the values of land in that vicinity, as those values have existed in the last few years, the last ten years? A. Yes. Q. Speaking now in reference to the land of the Redfield farm, and also the land of the Garwood farm as far as the Garwood farm goes out, that is to the end of the Redfield farm, how does those two pieces compare in respect to value?

Mr. MILLER.—We object on the same grounds heretofore stated, immaterial, irrelevant and incompetent.

Mr. MACOMBER.—Q. What is their general comparison?

Mr. MILLER.—It is also objected to as not rebuttal, part of their original case, a collateral matter by which they are bound, if they brought it in, in reference to the two places; we did not; also on the further ground he is not competent to testify to the matter.

Mr. MACOMBER.—Q. What is the general com-

(Testimony of D. R. Redfield.)

parison? A. About the same. Q. Now, you are familiar with the sales of real estate that have taken place there in the last ten or fifteen years? A. Of which place? Q. That is, of the sales of real estate that have taken place around that neighborhood in the last ten or fifteen years? A. Yes. Q. Do you know what the producing power, about what the producing power is of that land, that is, the Garwood place, [355] with respect to alfalfa? A. Yes. I know what I have produced, and I suppose they have got about the same kind. Q. When you sold your place, Mr. Redfield, what was the price per acre which you received? I am speaking now in reference to the 128 acres of which that land is composed, lying east of the levee.

Mr. MILLER.—Objected to as immaterial, irrelevant and incompetent, and not shown that the land was segregated in any manner, shape or form at the time of the sale, and on all the grounds stated in our previous objections, a collateral matter wholly, and not in any way involved here. A. I sold 140 acres for \$5000 to Schwartz.

Mr. MILLER.—I move to strike out the answer on the same grounds stated in our objections.

Mr. MACOMBER.—Q. How many acres of that land was inside of the levee; by that, I mean to the east of the levee—and usable for agricultural purposes.

Mr. MILLER.—The same objection. A. Well, that is a pretty hard question to answer.

Mr. MACOMBER.—Q. How many acres were

(Testimony of D. R. Redfield.)

there? A. We always called it 35 acres in the bottom, in the whole place, that would leave 125 acres; when I sold to Schwartz, I sold him 140 acres from the river to the back end. Q. Out of that land that you sold, how many acres were outside of the levee?

Mr. MILLER.—The same objection. A. I will tell you according to what I kept, 8 acres over the levee and 12 acres inside—now, you see I do not happen to know exactly how many acres there were in the bottom that I sold to Mr. Schwartz. Q. According to your best estimate at this time, how many were there in the Redfield farm a that time east of the old levee?

Mr. MILLER.—Same objection. All of this testimony, even if [356] admissible at all, would be too remote. A. About 22 acres, to the best of my knowledge.

Mr. MACOMBER.—Q. Pardon me, Mr. Redfield; when you say 22 acres, you mean— A. (Intg.) Over the levee. Q. Over the levee? A. That would leave about 122, I think. Q. You say there were how many altogether? A. There were 160 acres in the whole place, from the river to Mr. Drescher's place, the back end of the field; now, I kept out 20 acres, that left 140 acres that I sold to Mr. Schwartz. Now how many acres laid over the levee, I could not tell. Q. And about how much is that per acre?

Mr. MILLER.—Objected to as being a mere matter of calculation, and also on the same grounds that we have stated heretofore.

(Testimony of D. R. Redfield.)

Mr. MACOMBER.—Very well; I will withdraw the question. Q. Now, Mr. Redfield, what, in your opinion, was the value of that portion of the Garwood place, that is, per acre, which could be used for alfalfa at the time this plaintiff bought it.

Mr. MILLER.—We object to that as immaterial, irrelevant and incompetent, not rebuttal, a part of the original case of plaintiff, if she intended to make the proof at all, and the witness is not competent to testify as to the value of lands, and not the proper method of ascertaining or determining the issues in this case or the value of property. A. I always considered 100 acres as worth \$125 an acre, and 150 acres at \$100 an acre.

Mr. MILLER.—We move to strike out the answer on the grounds stated in the objection, and also on the ground it is not responsive.

Mr. MACOMBER.—Q. Now, then, Mr. Redfield, how many acres of land do you figure there would be on that ranch which would be what you would call alfalfa land. [357]

Mr. MILLER.—The same objection, A. Well, I figure 100 acres in the 100-acre field of the very best, and I figure 150 acres at \$100 an acre, laying between the house and the 100-acre field.

Mr. MACOMBER.—Q. In respect to the remaining land on the ranch, about 200 acres, what is your estimate of the value of that land per acre?

Mr. MILLER.—The same objection and an improper method of ascertaining the value of the land, and it is not rebuttal, it is part of the original case;

(Testimony of D. R. Redfield.)

the witness is not competent to answer the question, and it is in every way immaterial, irrelevant and incompetent.

Mr. MACOMBER.—Q. I will add to that at this time: I am speaking now entirely with reference to the land lying in the southeasterlymost part of the ranch, that is, the 200 acres farthest from the levee.

Mr. MILLER.—The same objection. A. \$60 an acre.

Mr. MACOMBER.—Q. Now, directing your attention, Mr. Redfield, to that portion of the ranch lying to the north and west of the old levee, that is, the outside land, the swamp land, what value would you place upon that at the same time, that is, when she bought the land?

Mr. MILLER.—The same objection. A. I call it worthless.

Mr. MACOMBER.—Q. Is that land usable for any agricultural purpose?

Mr. MILLER.—The same objection. A. No.

Mr. MACOMBER.—Q. Why not?

Mr. MILLER.—The same objection. A. It is nothing but sand.

Mr. MACOMBER.—Q. How is it in respect to overflow? [358]

Mr. MILLER.—The same objection.

Mr. MACOMBER.—Q. That is, how was it before the new levee was built there?

Mr. MILLER.—The same objection.

A. Covered with water when the river was up.

(Testimony of D. R. Redfield.)

Mr. MACOMBER.—Q. Now, Mr. Redfield, I will direct your attention to certain lands as shown on this map marked Defendant's Exhibit "J," do you know of a piece of land which was purchased a few years ago by some Japs, or a Jap, next adjoining the Garwood place? Do you remember that? A. Yes. Q. Do you know that land? A. Well, it is about the same as what lay in between, around Miss Garwood and the Saylor place.

Mr. MILLER.—We move to strike out the answer as not responsive.

Mr. MACOMBER.—Q. How does that land compare with the Garwood land lying directly adjoining on the west?

Mr. MILLER.—Objected to on the same grounds as heretofore stated in our objections.

A. About the same.

Mr. MACOMBER.—Q. Is there any difference in quality, so far as producing power is concerned?

Mr. MILLER.—The same objection.

A. No.

Mr. MACOMBER.—That is all.

Mr. MILLER.—We move to strike out the testimony of the witness on the grounds stated in the objections, among the grounds being that the testimony adduced from this witness is and was a part of the plaintiff's case in chief, and is not in any manner rebuttal; on the ground that it is immaterial, irrelevant and incompetent, insufficient for the purpose of establishing or showing any damage, and is not the proper measure of damages in this case, not the

(Testimony of D. R. Redfield.)

proper method of determining value of property, and is in every way immaterial, irrelevant and incompetent. [359]

Q. Mr. Redfield, how long did Mr. Schwartz keep that place after you sold it to him? A. Well, I don't know exactly; he did not keep it very long; I don't know whether it was a year.

Q. Was it not a little less than a year?

A. I think maybe it was; I don't think hardly though it was a year; it was not long.

Mr. HEWITT.—Q. He resold the place, did he? A. Yes. Q. Do you know what he received for it? A. Well, no, I do not. Q. Was it not a matter of common repute there, what he got for it? A. Yes, but he sold everything with the place. Q. Do you know what he got for everything? A. I don't remember. Q. Did it not exceed some \$12,000 or \$14,000? A. I could not swear to it. Q. You still retain 12 acres of the protected land, do you? A. Yes. Q. You are still the owner of it? A. Yes. Q. There are 22 acres altogether? A. No, sir. Q. How many acres are there? A. I kept 12 acres on one side and 8 on the other. Q. Both sides? A. I have got  $6\frac{2}{3}$  acres over the levee. Q. I mean all together, how many acres? A.  $18\frac{2}{3}$ . Q.  $18\frac{2}{3}$  acres? A. Yes. Q. The land value now there is about the same as it was in 1911, is it? A. About the same, yes. Q. Mr. Redfield, will you take \$350 an acre case in hand for your place today? A. My place is not for sale till I die. Q. You would not take it, would you? A. The place is not for sale. Q.

Testimony of D. R. Redfield.)

Would you take \$350 an acre for all of your land?

A. The place is not for sale. Q. That is the only answer you will make? A. Yes. Q. I will give you

\$350 an acre for that place of yours today in cash.

You would not take it? A. I have told you it was

not for sale. Q. Now, Mr. Redfield, what have you

devoted your place to raising? A. Alfalfa. Q.

Have you raised corn? A. Yes. [360]

Q. Have you raised potatoes? A. Yes. Q. What

is the highest yield per acre that you obtained from

that place of yours in the past for raising potatoes?

A. Well, I have never measured the acreage.

Mr. MACOMBER.—We object on the ground that potatoes are not alfalfa.

Mr. MILLER.—Your testimony has been confined to the producing of alfalfa on that ground?

Mr. MACOMBER.—Yes.

Mr. HEWITT.—Q. What is your answer? A. I say that I never measured the ground off when I

raised potatoes. Q. Haven't you raised as high as

100 sacks of potatoes to the acre there? A. No, and

nobody in the state ever did. Q. Have you ever told

anybody that you raised that number of sacks? A.

No. Q. Have you ever raised 400 sacks to the acre?

A. I never told anybody. Q. Have you raised 400

sacks to the acre there? A. To the acre? Q. Yes.

A. How can a person tell what a person raises when

he never measures the ground. Q. Have you ever

estimated that you raised 400 sacks to the acre? A.

I don't think I ever did. Q. You never told any-

body that you had? A. I don't think so.

(Testimony of D. R. Redfield.)

Mr. MACOMBER.—The same objection, immaterial, irrelevant and incompetent.

Mr. HEWITT.—Q. What is your recollection concerning what you have said the land will produce in potatoes? A. Well, I consider 300 sacks of potatoes to the acre a big crop. Q. You have raised more than that, have you not? A. I don't think I ever did.

Q. Do you remember a conversation that you had with me in Lincoln one day concerning a potato crop on your place? A. No. [361]

Q. You don't recall it? A. No. Q. You say the land west of the old levee was nothing but sand, I believe? A. Yes. Q. Is it not grown up to timber? A. Some. Q. Aren't there some large trees there? A. I believe so. Q. Very many? A. I don't know, not so very many. Q. Isn't it just about the same as the timber land along the line of the levee from Nicolaus south and Nicolaus north? A. Well, there is timber on it. Q. Do you know the Drescher land, that adjoins your land? A. Yes. Q. Do you know the piece that was owned by Carl Drescher? A. Yes. Q. Do you know what he obtained per acre for that land? A. Yes. Q. How much was it? A. \$200. Q. Was it exactly, \$200, or was it \$240? A. No. Q. I did not get your answer. A. The way I got it from Kreig, he paid \$200 an acre. Q. There is a slough that runs through that land, is there not? A. Carl Drescher's? Q. A sort of slough that runs through there? A. Yes. Q. Do you know the John Borgman place? A. Yes, I know it; I have been

(Testimony of D. R. Redfield.)

there several times. Q. Do you know what he paid for it? A. No. Q. You never heard what he paid for it? A. No. Q. Do you know what its market value is to-day? A. No. Q. Do you know the May place? A. Yes. Q. Do you know what the market value of that place is to-day? A. No. Q. Did you know in 1911 what the market value was? A. I know what he paid for it. In 1911? A. At the time that he bought it from Storm, I know what he paid for it. Q. Do you know the market value in 1911? A. Of the Saylor place? Q. The May place. A. The May place, no, I do not. Q. When you refer to the value of a ranch, Mr. Redfield, what do you mean by it? What is your understanding? When you speak of the value of a ranch, what do you understand by that term? A. Well, what it brought at that time.

#### Redirect Examination.

Mr. MACOMBER.—Mr. Redfield, as long as Mr. Hewitt spoke of your place, your place is a little different, isn't it, from the majority [362] of these places along there?

Mr. MILLER.—Objected to as immaterial, irrelevant and incompetent; he has already testified it was practically the same ground.

Mr. MACOMBER.—I mean in respect to improvements. Isn't it a fact, Mr. Redfield, that you take a great deal of pride in your little place? A. I do. Q. Isn't it true that you are very attached to your little place? A. Yes. Q. You have taken great pleasure in fixing it up according to your ideas?

(Testimony of D. R. Redfield.)

Mr. MILLER.—Objected to as immaterial, irrelevant and incompetent.

Mr. MACOMBER.—Q. How is your place fixed up in comparison with the other places along there, Mr. Redfield?

Mr. MILLER.—The same objection. A. I don't know. They are all fixed up pretty good.

Mr. MACOMBER.—Q. As a matter of fact, isn't that place kept up, right up to the minute, in respect to appearance and looks?

Mr. HEWITT.—That is objected to as leading.

Mr. MACOMBER.—I know it is leading. I will withdraw the question.

Q. In respect to the Borgman estate, have you ever been on the Borgman estate in recent years? A. Yes, I have been there several times. Q. This man Borgman, what kind of a man is he, so far as getting stuff out of the soil is concerned? A. Well, he gets it out if anybody can. Q. He gets it out if anybody can? A. Yes.

Q. As a matter of fact, he is far and away ahead of any of the rest of the fellows around there, is he?

Mr. MILLER.—That is objected to as immaterial, irrelevant and incompetent, and calling for a conclusion. A. Yes.

Mr. MACOMBER.—Q. How has he got that place improved in reference [363] to irrigation? A. Well, he has got it cemented from one end to the other. Q. What do you mean by cemented? A. He has got his cement pipes running through his land; you can cement a piece to-day and shut that off and

(Testimony of D. R. Redfield.)

go right along until you have got the whole place irrigated. Q. Mr. Redfield, I am going to ask you this question: You have been in that neighborhood for a great many years; you have seen property changing hands. Now, when we speak of the size of a piece of property—if you look on that map and you think of the pieces of property around that neighborhood and compare the sizes of them, how does the Garwood ranch compare in size with all the places around it, that is, to the various places around it?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, and not redirect examination.

A. It is larger.

Mr. MACOMBER.—Q. Mr. Redfield, in reference to that Adam Kreig place, how many acres are there to that ranch? A. I think there are 56 acres. Q. Is there any land which is not subirrigated on that?

Mr. MILLER.—Objected to on the same grounds.

Mr. MACOMBER.—I will withdraw the question. Q. When land is sold in that neighborhood in small pieces, how does the price compare with the sale where the piece is very large?

Mr. HEWITT.—Objected to as immaterial, irrelevant and incompetent, and as calling for the conclusion of the witness on a matter about which he is not known to be familiar, and as not a proper method of ascertaining or determining values in this case, and not rebuttal, and calling for the opinion and conclusion of the witness.

A. Well, it brought more money.

(Testimony of D. R. Redfield.)

Mr. MACOMBER.—Q. A small piece brings more per acre? [364]

Mr. MILLER.—The same objection. A. Yes.

Recross-examination.

Mr. MILLER.—Q. When you fixed a value on the 100-acre field, you fixed a value on it wholly for alfalfa purposes, did you? A. Yes.

Q. And the second piece here, for the same purpose? A. Yes.

Q. And the third piece for the same purpose?

A. Well, I do not call the third piece alfalfa land.

**Testimony of D. J. Mulvany, for Plaintiff (in Rebuttal).**

D. J. MULVANY, recalled for plaintiff in rebuttal, sworn.

Mr. MACOMBER.—Q. Mr. Mulvany, I believe on your former examination you testified as to the value of the land on the Nicolaus place, that is, at the time it was purchased by Miss Garwood, but your testimony was confined to the land in the southeasterly most corner and to the land lying outside of the levee; there are 250 acres of land, that is lying easterly from the old levee, which you did not appraise. I would like to ask you now, Mr. Mulvany, what do you figure the land to be worth on the Garwood place—I am speaking now of what it was worth in 1911—that portion which is what you would call alfalfa land?

Mr. MILLER.—We object and protest against this witness being recalled; he was here on the stand and testified fully on three or four occasions, I think, was

(Testimony of D. J. Mulvany.)

recalled time and again. This testimony if admissible at all would be part of the plaintiff's original case, and there is no reason or excuse for his not having given it at that time; that it is immaterial, irrelevant and incompetent and not in any way admissible as rebuttal or otherwise. [365]

Mr. MACOMBER.—I will state here that inasmuch as the Court entitled the defendants to put in testimony as to the value of lands concerning which the plaintiff in her complaint has never complained, the plaintiff is therefore entitled to rebut that testimony by evidence as to the value of the land which you were permitted to value. A. 100 acres on the west side of the ranch, east side of the Vernon and Nicolaus Road, at \$125 an acre, and 150 acres or so east of that portion, toward the center of the ranch, \$100 an acre. Q. If I understand your statement, the very best land on that ranch at the time the plaintiff bought it was not worth more than \$125 an acre.

Mr. MILLER.—Objected to as leading, immaterial, irrelevant and incompetent, and an assumption by counsel not justified by the evidence, and we also object to it on the other grounds stated in our previous objection.

Mr. MACOMBER.—I am merely repeating the witness' answer.

Mr. MILLER.—If he testified to it, there is no necessity of repeating that.

Mr. MACOMBER.—I think you are correct. Q. Mr. Mulvany, are you familiar with the land lying

(Testimony of D. J. Mulvany.)

directly east of the 160 acres, the lower portion of the Garwood Ranch?

Mr. MILLER.—The same objection.

Mr. MACOMBER.—By that piece I refer to the land which was bought a few years ago by the Japs.

Mr. MILLER.—The same objection and the further objection that it is a collateral matter, not in any way involved, and something you are not entitled to go into.

Mr. MACOMBER.—Q. How does that land compare, Mr. Mulvany, with the Garwood land? [366]

Mr. MILLER.—The same objection. A. With what portion of the Garwood land? Q. That is that portion which lies directly west of the Mays place and the Schwall place?

Mr. MILLER.—The same objection. A. The 60 acres?

Mr. MACOMBER.—Q. Yes. A. It is about the same character of land only it is higher, higher in elevation. Q. In respect to value, how would it compare in 1911?

Mr. MILLER.—The same objection. A. Well, it was worth more than that piece.

Mr. MACOMBER.—Q. Worth more? A. More than the Garwood piece. Q. Worth more than the Garwood piece? A. Yes. Q. Now, Mr. Mulvany, how does the Redfield farm compare in value agriculturally with the Garwood farm?

Mr. MILLER.—The same objection.

Mr. MACOMBER.—Q. How did it compare in 1911?

(Testimony of D. J. Mulvany.)

Mr. MILLER.—The same objection. A. I don't know as I understand the question. Do you mean what is known as the Redfield Ranch or what he owns now?

Mr. MACOMBER.—Q. What is known as the Redfield farm.

Mr. MILLER.—The same objection. A. It is similar to the Garwood farm right adjoining; the front is the best and the poorest in the rear.

Mr. MACOMBER.—Q. How would you say that the Saylor place compared with the Garwood place?

Mr. MILLER.—The same objection and not in any manner rebuttal? A. As a whole it is a much better ranch than the Garwood ranch. There is a much larger proportion of it alfalfa land or for any other purpose.

Mr. MACOMBER.—Q. Now, Mr. Mulvany, I wish to call to your mind [367] the improvements existing upon the Garwood place in 1911, at the time the plaintiff bought it, and the improvements which were on the Saylor place at the time Mr. Saylor bought it. How did they compare, if you can answer the question?

Mr. MILLER.—The same objection. A. Well, the buildings on the Saylor ranch that is, the barn was newer, the house was a small one; the farm dwellings are a little better; I think they were built a little later, but not so large, not so many of them.

Mr. MACOMBER.—Q. With respect to the fences that were on the Saylor place?

Mr. MILLER.—The same objection. A. The

(Testimony of D. J. Mulvany.)

fences up there are all alike, very little difference.

Mr. MACOMBER.—Q. Now, Mr. Mulvany, can you state as to the condition of the market in that vicinity for land from the year, say 1900 up to 1911—10 or 12 years in there before the reclamation—during that period of time, the 10 or 12 years which elapsed immediately previous to the time reclamation was commenced, how the market stood in reference to the land along there?

Mr. MILLER.—The same objection.      A. Very few sales, very little change in value.

Cross-examination.

Mr. HEWITT.—Q. Mr. Mulvany, is it not a fact that from 1900 to 1911 land in Sutter County generally in market value, doubled in value?    A. Not in that section.    Q. In Sutter County, generally?    A. Up about Yuba City, there have been increases there but not in this section.    Q. But you are acquainted with the land in Sutter County about Live Oaks?    A. Not the extreme end of the county.

Q. Did you ever teach school in that country?    A. No.    [368]

Q. Did you teach school at Pennington?    A. You taught school there.    Q. Did you teach school in Pennington?    A. I taught school in '77; that is a long time ago.    Q. At Pennington?    A. Yes.    Q. That is near Live Oaks?    A. It is 6 or 7 miles.    Q. Do you know where the Bird Ranch was at Live Oaks?    A. I passed by it, yes.    Q. What was it used for up to 1906 or 1907?    A. I passed by that place very little since I taught school.    At that time it was used

(Testimony of D. J. Mulvany.)

as a wheat ranch. Q. You don't know whether up to 1907 that had been used for anything else. A. 1907? Q. Yes, 1906 or 1907. A. I think it was mainly a wheat ranch about that time. Q. It was a tract something like 2500 acres, was it not? A. I don't know the size of it; I know it was a large tract. Q. Do you know what it sold for? A. No. Q. Did you ever hear what it sold for? A. No. I understood it was divided up into small tracts. Q. I am speaking of it as a whole? A. No, I never heard. Q. It was subdivided into small tracts? A. Yes. Q. Have you passed through that section of the country in the last 3 or 4 years? A. Yes, about a year ago I passed by on the train. Q. The land there improved is selling for what prices, do you know? A. That land in late years has been placed under sub-irrigation, and a section of that is selling at a better price than it did some years ago. Q. You don't know that Mr. Bird received \$135 an acre for that place, do you—I mean the first sale of the whole tract of 2500 acres? A. I understood he sold only part of it; he still owns part of it. Q. The Bird ranch at Live Oaks, the old place, is still owned by the Bird family, that is out near Yuba City. You never heard he received \$135 an acre? A. No. Q. It was not under irrigation until after it was subdivided, was it? A. I could not say. I do not live in that section of the county. [369]

Q. You are not acquainted there? A. Very little; I have some acquaintances up there. Q. You don't know about what the market value of land was in that

(Testimony of D. J. Mulvany.)

section? A. In the north end of the county? Q. Yes. A. No.

Mr. MACOMBER.—Where is this district that you are speaking about, how far from this land?

Mr. HEWITT.—About 30 miles, I should judge.

The WITNESS.—About 30 miles.

Mr. MACOMBER.—That is further than Sacramento, I think that is irrelevant.

Mr. HEWITT.—I want to see what his ideas are about the market values of lands. Q. The land up there in that section would not produce alfalfa without irrigation, would it? A. I don't know; when I was in that section there was very little alfalfa raised in the county at that time, that I taught at Pennington—there was very little, scarcely any alfalfa raised in that county 40 years ago. Q. Was alfalfa raised along the rivers? A. Some, but not much. Q. Take the land right east of Nicolaus, from 1900 to 1911, did it not more than double in value? A. No. Q. Do you know what the Morehead piece sold for? A. I don't know what it was sold for; that must have been sold within the last year or so. Q. It has been sold for several years? A. Which Morehead place? Q. The Frank Morehead place. A. No, I didn't know that he had sold it. Q. I believe you told me on the examination the other day, that Baldwin had paid something like \$65? A. I understood about fifty. Q. Have you found anything to the contrary since you were a witness? A. No. Q. Was that its market value at that time? A. Well, I suppose it was. That was

(Testimony of D. J. Mulvany.)

the price he paid for it. Q. You suppose so? A.

Yes. Q. You don't know that he paid \$131, do you, an acre, [370] for it—\$131.50? A. No, I do not.

Q. Something like that? A. No. Q. You don't know that he did not? A. No. Q. What was your

idea in saying that \$65 an acre, Mr. Mulvany? A.

That is what I heard. Q. When did you hear it?

A. About the time he bought it. Q. Who did you

hear it from? A. I don't know; he bought it sev-

eral years ago. Q. Which is worth more, land that

will raise alfalfa without irrigation or land that will

raise alfalfa with irrigation, providing the crop pro-

duction is about the same in tons? A. Why the land

that will raise alfalfa without irrigation is the better.

Q. For what purpose do you place \$125 an acre on

the Garwood one hundred acre field? A. The mar-

ket price for the land for any purpose it might be

used for. Q. For raising alfalfa? A. Well, it is

not very fine alfalfa land; it is not as good now as

it used to be. Q. I believe you stated the other day

it was rated, that little piece of upland there, as one

of the best ranches in that section? A. As the

largest ranch. Q. Mr. Mulvany, do you place \$125

an acre upon that Garwood ranch there of 100 acres

there for alfalfa purposes? A. General purposes,

alfalfa specially. Q. Isn't it good hop land? A. If

you used it for that it probably would not be worth

that much now. Q. I say is it not good hop land?

A. I never saw it tried. Q. Do you know what good

hop land is? A. I think so. Q. You have been en-

gaged in that business? A. I have. Q. Is your

(Testimony of D. J. Mulvany.)

land similar in quality to the land of Mr. Scheiber, that he formerly owned? A. Mine is better. Q. Better land? A. Yes. Q. Have you got any market price upon your land? A. I never placed a market price on it. Q. Would you sell it? A. I will, if you will talk to me after I get through. Q. I will ask you right now. Q. We will give you \$250 an acre for it, just as it stands. Will you take it? A. Will you take the outside ranch with it? Q. We are speaking of the ranch that is similar in character to the Garwood property? A. I don't wish to sell that alone. [371] I will make a real estate deal with you now, if you want to take the 300 acres on Coon Creek. Q. I understand what you have on Coon Creek. I am speaking of your land that is similar in character to the Garwood Ranch, that land in there near the river? A. I will make you a deal if you will take the outside land; you can have it. Q. Will you take \$250 an acre for it? A. Not separate from the other, because I want them together. I don't wish to sell it now.

Redirect Examination.

Mr. MACOMBER.—Q. Mr. Mulvany, Nicolaus has been your home for a great many years? A. Yes, 35 years. Q. And you individually, are you contemplating leaving Nicolaus? A. I have been away awhile; I am anxious to get home. Q. Do you place any value on that land in reference to yourself other than market value?

Mr. HEWITT.—We object to that as immaterial, irrelevant and incompetent. A. Yes.

(Testimony of D. J. Mulvany.)

Mr. MACOMBER.—The plaintiff rests.

Mr. MILLER.—We move to strike out the testimony of this witness and of each of the other witnesses offered in rebuttal, so far as it relates to damages, upon the ground that all such testimony is irrelevant, incompetent and immaterial and part of the plaintiff's case in chief; also it is incompetent to prove market value of the land; also it is incompetent to prove or establish damages in this case, and that there was no permission obtained in any manner, shape or form nor was it asked to reopen plaintiff's case to introduce any other evidence, and it appears from the contract the property was sold as a whole and not in subdivisions or in parcels, each parcel being sold in conjunction with the other, and on the various grounds stated in our objections to the questions asked we move to strike out all of the testimony.

Defendants rest. [372]

### **Stipulation as to Original Exhibits.**

It is hereby stipulated and agreed by the plaintiff in this action, that all of the original exhibits used on the trial of this action in the District Court of the United States for the Northern District of California, may be transferred from said court to the United States Circuit Court of Appeals, for the Ninth Circuit, and used on the hearing and determination of the appeal of the plaintiff from the judgment heretofore entered in this action, with the same force and effect as if the same had been incorporated in the said Bill of Exceptions and set out in

the original and copies of the transcript to be filed in this said action.

Dated —, 1916.

LLOYD MACOMBER,  
Attorney for Plaintiff.  
A. H. HEWITT and  
ARTHUR E. MILLER,  
Attorneys for Defendants.

The photographic reproductions hereinafter attached are facsimile reproductions of certain exhibits introduced in evidence by the parties at the trial of this action. [373]

CALIFORNIA COLONIZATION CO., SACRAMENTO

**160 Acres**

In Sutter County, 5 miles west of Yuba City, \$3000. House, barn, tank and tank house. One hundred and fifty acres planted to grapes as follows: 20 acres Malaga, 30 acres Alameda, 23 acres Sultana, 5 acres Tokay, 5 acres Imperior, family orchard of 75 trees and about 100 citrus trees, 10 inch well 175 feet deep; engine and pump. Five acres in alfalfa. Price \$200 per acre. 21-B

**116.92 Acres**

Near the town of Gridley, Butte County, Son seedless grapes, 25 acres in alfalfa. Improvements consist of a large brick residence of 11 rooms in first-class condition. Large barn, carriage house and plenty of shade trees. Windmill and tank house. Improvements are worth \$10,000. Price \$130 per acre; \$2000 cash and four annual payments of \$2500 each with interest at 6%. Remainder can be paid to suit purchaser. 23-B

**60 Acres**

One mile northeast of Elk Grove. No improvements. Price \$65 per acre as a whole or in tracts. 23-B

**105 Acres**

One-half mile north of Elk Grove, lying east of the Railroad. No improvements. Price \$100 per acre in tracts to suit. 23-B

**600 Acres**

In Sutter County. River bottom land, east bank of the Feather River, near Nicholans. Is protected from overflow by levee. Under cultivation, mostly alfalfa, there being 300 acres in alfalfa, balance adapted to growth of alfalfa. At present land is divided into fields for pasturing stock. Is fenced and cross-fenced into many fields. Two good houses with modern improvements. Good barns for horses and cattle. Two pumpkins, plants with large tanks for water. Wagon shed, blacksmith shop and other outbuildings. This is fully equipped for dairy and cheese making. Cheese plant is not included in sale price but can be bought, as desired, at market price. The whey from cheese plant is pumped into a tank half a mile distant, where it is fed to hogs. The soil is deep, rich, sediment loam and falls. Once cut five and six crops per season without irrigation. Price \$75,000. Reasonable terms can be arranged. 48-B

**160 Acres**

Two and one-half miles from California house, large barn, 48 by 56, granary, wagon shed, 10 chicken houses and 2 brooder houses. All fenced into 4 fields: 12 acres in vineyard, 12 acres in alfalfa, 10 old. Good windmill and tank. Water is piped into house full bearing, on each side of house running to the house; 1/2 white and 1/2 black figs. Hand planted to grain. Red soil, some gravel. Water from 20 to 30 feet deep. Two brooders, 1 cow, 150 chickens, 1 pig, 40 olive, 1 vineyard plow, 2-horse wagon, harness for horses, 1 incubator and 2 brooders go with the place. Selling price \$5500; terms, one-half cash. 61-B

**165 Acres**

On Merritt Island. Ninety acres now in alfalfa, fine stand; 30 acres more sowed. Improvements consist of 9-room modern dwelling, 5-

California has two great Universities for higher education.

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(Endorsed:)  
No. 15701  
Garwood vs. Schelber,  
Defts. Exhibit No. I  
7/28/16 (M) Clerk.

**PLAT**  
OF THE LAKES OF  
HARVILL, CANADA  
AS SURVEYED 1884  
BY THE U.S. ARMY  
ENGINEERS

Total 6098 Acres

of scale = 1 inch = 200 feet

1870





(Enclosed:)  
 No. 15701  
 Garwood vs. Schwallberg,  
 Defts. Exhibit No. 3  
 (s) Clerk.





Photo. # 9.

Soil Type III

merging into Soil  
Type II in the  
distance

No. 15701 + 15709

Lowood on Schickel

(Type) Exhibit No. 13

7/27/15

CB

Photograph # 10

General view of old  
algae field. Pipeline  
Gas and Electric power  
line is in the far  
ground. Soil Type  
III merging into  
Soil Type II

No. 15701 + 15709

Lowood on Schickel

(Type) Exhibit No. 14

7/27/15

CB



[Title of Court and Cause.]

**Stipulation to Correctness of Bill of Exceptions.**

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the within cause that the foregoing bill of exceptions is correct, and that the same may be certified and authenticated by the Honorable WILLIAM C. VAN FLEET, judge of the United States District Court for the Northern District of California.

Dated November 21st, 1916.

(Sgd.) LLOYD MACOMBER,  
Attorney for Plaintiff.

(Sgd.) A. H. HEWITT and  
ARTHUR E. MILLER,  
Attorneys for Defendants.

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[Title of Court and Cause.]

**Order Settling Bill of Exceptions.**

The Bill of Exceptions in this action was duly prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the Bill of Exceptions in the above-entitled cause, and the same is hereby ordered to be a part of the record in said action.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of December, 1916.

(Sgd.) WM. H. SAWTELLE,  
Judge.

[Endorsed]: Filed December 13, 1916. Walter B. Maling, Clerk. [378]

[Title of Court and Cause.]

**Petition for Writ of Error.**

Isabelle Garwood, plaintiff in the above-entitled action, feeling herself aggrieved by the decision and judgment of the Court in favor of defendants in said above-entitled action, rendered and entered on the 18th day of February, 1916, whereby it was adjudged that plaintiff take nothing by her said action, and that the defendants have judgment against plaintiff for their costs of suit, comes now, by her attorney, Lloyd Macomber, and petitions the above-entitled court for an order allowing plaintiff to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit, and herewith plaintiff presents her assignment of errors. And your petitioner will ever pray.

Dated August 14th, 1916.

ISABELLE GARWOOD.

ISABELLE GARWOOD,

Plaintiff.

LLOYD MACOMBER,

Attorney for Plaintiff. [379]

Receipt of Copy of the within Petition for Writ of Error, in the case of Garwood vs. Scheiber et al., No. 15,701, in the District Court of the United States, for the Northern District of California, is hereby admitted, this 17th day of August, 1916.

ARTHUR E. MILLER and  
A. H. HEWITT,

Attorneys for Defendants.

[Endorsed]: Filed Aug. 15, 1916. Walter B. Mal-  
ing, Clerk. [380]

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[Title of Court and Cause.]

**Assignment of Errors.**

Now comes Isabelle Garwood, plaintiff in the above-entitled action, by Lloyd Macomber, her attorney, and files the following as errors upon which she will rely upon her prosecution of the writ of error in the above-entitled action, viz.:

The decision and judgment of the Court in the above-entitled action is error, and said decision and judgment is against law and unjust, in this, namely, said decision is entirely unsupported by the evidence, and is contrary to the evidence, and the particulars in which said decision and judgment is contrary to the evidence, and in which the evidence is insufficient to support said decision and judgment, are as follows, to wit:

The evidence shows that the land involved in the issues of this action was sold to the plaintiff by the acre and not in gross.

The evidence shows that said land was sold to the

plaintiff, and that she bought the same, as six hundred acres at the agreed price of one hundred and twenty-five dollars per acre.

The evidence shows that said land was represented to plaintiff and sold to her as six hundred acres of first class alfalfa land, which was protected from overflow by levee; and that plaintiff bought said land upon and by reason of those representations.  
[381]

The evidence shows that not more than two hundred and fifty acres were as represented.

The evidence shows that instead of there being six hundred acres there was an absolute shortage of more than seventy acres.

The evidence shows that instead of their being six hundred acres to said land of a character best adapted to the raising of alfalfa, there were only four hundred and fifty acres which could be used for any agricultural purpose whatever, and that there was not more than four hundred and fifty acres of said land which had any agricultural or commercial value. The evidence shows that not more than four hundred and fifty acres of said land had ever been used by defendants for agricultural purposes, and that there were not more than four hundred and fifty acres which could be used for any agricultural purposes.

The evidence shows that of the four hundred and fifty acres which might be used for agricultural purposes, not more than two hundred and fifty acres could be used for growing alfalfa, and that the remaining two hundred acres was subject to overflow

to such an extent that the raising of alfalfa thereon was a commercial impossibility.

The evidence shows that of the four hundred and fifty acres of said land which plaintiff actually received which was capable of being used for agricultural purposes, the two hundred acre portion thereof which was subject to overflow was not worth more than sixty dollars per acre, and that plaintiff was damaged to the extent of sixty-five dollars per acre for each and every one of said two hundred acres.

The evidence shows that defendants and their agents took plaintiff upon said land, but that in so doing they were careful to show her only the portion thereof which could be used for agricultural purposes, and purposely refrained from showing her the swamp land outside of the old levee, and purposely refrained from showing her that more [382] than seventy acres of said land was at that time beneath the channel of a navigable river, and for that reason not their property and impossible of being conveyed by them, and said defendants and their agents purposely refrained from advising plaintiff of the fact that not more than four hundred and fifty acres of said land could be used for any agricultural purpose.

The evidence shows that plaintiff has been damaged in the sum of more than twenty-one thousand dollars which she has had to pay in reclamation assessments to reclaim and protect from overflow land which in said sale to her was represented to her as being free from overflow.

The evidence shows that notwithstanding this ex-

penditure of money for reclamation purposes plaintiff still has only two hundred and fifty acres of land which is as was represented to her.

The evidence shows that said land was represented to plaintiff as being subirrigated (meaning self-irrigated), and that no irrigation would be necessary for the raising of alfalfa; and the evidence shows that the same two hundred acres which were hereinbefore stated to be worth but sixty dollars per acre, that is to say, the two hundred acres at the southeasterly most end of the tract, has so little subirrigation that it is not commercially practicable to attempt to raise alfalfa thereon without artificial irrigation.

The evidence shows that the plaintiff, at the time the said land was sold to her, was a woman without any business experience or understanding, and without any experience or understanding of any character in reference to land or farming, and without any experience or understanding whatever in reference to matters appertaining to said land or the purchase thereof, and that she fully believed and relied upon the representations of defendant's agents; and the evidence shows that these facts were well known to defendants' said agents.

The evidence shows that in purchasing said land plaintiff was [383] guided by and acted upon the advice and counsel of a friend and adviser, one F. I. Ramos, with whom plaintiff occupied a confidential relationship—with whom she was engaged to be married—which fact was at all times well known to defendants' agents who represented defendants in said sale; and the evidence shows that, in so far

as the selection of said land was concerned, said F. I. Ramos was the confidential agent of the plaintiff, which said fact was at all times well known to defendants' said agents.

The evidence does not show that said F. I. Ramos was the agent of the plaintiff for any purpose whatsoever other than to advise her in respect to what land she should or should not buy; and the precise extent of the power and agency of said F. I. Ramos for the plaintiff was well known to the defendants' said agents.

The evidence shows that defendants' said agents bribed and corrupted plaintiff's said confidential agent and adviser, said F. I. Ramos, by secretly paying to said F. I. Ramos the sum of fifteen hundred dollars, and that by reason of the said bribery and corruption of plaintiff's said betrothed and confidential agent and adviser, plaintiff was misadvised and misled to her prejudice and financial loss and damage in the sum and amount prayed for in her complaint in said action.

The evidence shows that the said land was represented to plaintiff as being "River Bottom" land, and as being subirrigated; and the evidence shows that not more than the aforesaid two hundred and fifty acres were of that character.

The evidence shows that the said land is of the following character and value, and was of the following character and value at the time of said sale, that is to say:

(1) The two hundred and fifty acres of said land lying immediately east and south of the old levee is

of a character practically the same as was represented by said defendants' agents, and that said [384] two hundred and fifty acres was at said time worth not more than the price plaintiff paid for it, to wit, one hundred and twenty-five dollars per acre.

(2) That the remainder of said land lying at the southeasterly end of the said tract were not as represented by defendants' said agents, either in respect to overflow, or in respect to subirrigation, or in respect to the character of the soil, and said two hundred acres was at the time of said sale worth not more than sixty dollars per acre.

(3) That the remainder of said land, to wit, all of that which lies outside, or northwest of the old levee, is not as represented in any respect whatsoever, and that the sixty or seventy acres of land which was actually there, and which plaintiff actually received, is useless for any agricultural purpose, and is commercially valueless.

The complaint in this action alleges that the said land in question was represented and sold to plaintiff as a certain specified number of acres of a certain specified character of land at a certain specified price per acre. The complaint alleges that there are certain acres missing, that is, that there is an absolute shortage from the number of acres represented and agreed upon. The complaint also complains and alleges that a large number of acres of the tract are not as represented, to such an extent that those acres are unfit and unusable for any agricultural purpose and commercially worthless. The complaint further complains and alleges that a very large portion of the

land, about two hundred acres, is not as was represented, and, while not agriculturally valueless, is not worth more than sixty dollars per acre. The remaining portion of the tract, about two hundred and fifty acres, is not mentioned in the complaint, it being thereby admitted that that portion of the land is practically [385] in accord with the representations which were made to plaintiff at the time of the sale. The complaint in this action was framed, and seeks to recover, upon the theory that the plaintiff is entitled to compensation, at the agreed price per acre, for all acres missing and for all acres commercially worthless, and that plaintiff is also entitled to compensation and reimbursement to the extent to which the other acres complained of fall below the character and quality represented to the plaintiff at the time of the sale. One of the defenses interposed by the defendants was to the effect that, disregarding any representations made by the sellers, and ignoring any agreed price per acre which there might have been between seller and buyer, if it could be proven that the land in its entirety, including that portion uncomplained of, was worth the money plaintiff paid for the land, the plaintiff had received the equivalent of the money which she had parted with, and had, therefore, suffered no damage. Over the objection and exception of the plaintiff the Court allowed the defendants to put in evidence, outside of the contract between the parties, to the effect that the land in its entirety, including that portion uncomplained of in the complaint, was worth the full amount which plaintiff had parted with under the transaction. The

Court allowed a number of witnesses to testify for the defendants, that the land in its entirety was worth the sum of seventy-five thousand dollars which plaintiff had paid. This action of the Court in allowing that testimony is hereby assigned as error, and the text of the evidence and proceedings had in respect to that testimony and ruling of the Court are as follows:

Questions asked Charles F. Silva:

Q. Now, Mr. Silva, do you know what the market value of that real property, the Scheiber Brothers' ranch, bought by Miss Garwood, [386] was on the first of November, 1911?

Mr. MACOMBER.—One moment. What do you refer to, the entire land?

Mr. MILLER.—Yes.

Mr. MACOMBER.—You asked him if he knew?

A. Yes, I do.

Mr. MILLER.—Q. What was the market value?

Mr. MACOMBER.—We object to the question; we object to any testimony being taken as to the ranch in its entirety, upon the ground that it is incompetent, immaterial and irrelevant, and not within the issues of this case, and has nothing to do with this controversy.

The COURT.—The objection is overruled.

Mr. MACOMBER.—We note an exception.

### EXCEPTION No. 3.

(Questions asked G. A. WESSING.)

Q. Did you know the value of the Scheiber property or the Garwood property in 1911? A. Yes.

Q. Taking the ranch as it stood there as a whole at

that time, what was its valuation?

Mr. MACOMBER.—Now, one moment, if your Honor please, in order to save time, it will be understood that my objection made yesterday to the value of the ranch in its entirety or the value of the property not described in the complaint will run to all these questions?

The COURT.—Yes.

Mr. MACOMBER.—Subject to the same ruling?

The COURT.—Yes.

Mr. MACOMBER.—I note an exception.

#### EXCEPTION No. 7.

(Questions asked ISABELLE GARWOOD, the plaintiff.)

Q. Now, Miss Garwood, about three months after you got this place [387] did Mr. Charles Silva offer to take it off your hands at the price you paid for it?

Mr. MACOMBER.—We object to that as immaterial, irrelevant, and incompetent and nothing to do with this case whatever; it does not make any difference what offer was made to her.

The COURT.—When was that?

Mr. MILLER.—About three months after the purchase of the property.

The COURT.—I will overrule the objection.

Mr. MACOMBER.—We note an exception.

#### EXCEPTION No. 2.

(Questions asked CHARLES F. SILVA.)

Mr. MILLER.—Q. Mr. Silva, did you on the occasion of a visit to the ranch with Miss Garwood, shortly after her purchase of the Scheiber property,

offer to pay her \$75,000 for that ranch?

Mr. MACOMBER.—We object to the question on the ground that it is immaterial, irrelevant, and incompetent.

The COURT.—The objection is overruled.

Mr. MACOMBER.—Exception.

EXCEPTION No. 3.

A. Yes.

Irrelevant documentary evidence allowed by the Court:

Mr. HEWITT.—We now offer in evidence a certified copy of the judgment-roll in the case of Isabelle Garwood vs. L. M. Curtis et al., a record of the Superior Court of the County of Sutter, State of California, together with all endorsements on the several papers constituting the judgment-roll, it being an action of plaintiff to correct and quiet the title to the property which she purchased of the defendants in this action.

The COURT.—Who are the parties defendant?  
[388]

Mr. HEWITT.—There are about forty or fifty of them, I should judge, if the Court please. It was a proceeding brought under Sections 749, 750 and 751 of our Code, and the object of introducing it is for two purposes; first, the contract entered into between plaintiff and defendants provides if there are any defects in the title that they will be rectified, if your Honor please, to the extent of \$250 expenses toward carrying it out; the second is that the complaint in this action is a verified complaint, verified by plaintiff herself, and shows which she says under

her own verification she is the owner of; that is, it gives a description of it.

Mr. MACOMBER.—Now, if your Honor please, we object to this upon the ground that it is immaterial, irrelevant, and incompetent, and has nothing to do with this case.

The COURT.—It may be received in evidence.

Mr. MACOMBER.—We note an exception.

#### EXCEPTION No. 5.

Mr. HEWITT.—I now offer in evidence a certified copy of the warrant issued by reclamation district No. 1001, bearing date December 30, 1911, for the sum of \$5,106.43, together with all endorsements on the warrant in question, the warrant being endorsed, "Pay to the order of Isabelle Garwood, Levee District No. 6, by J. J. McNamara, Chairman, Julius Rolfe, Clerk," also endorsed "Isabelle Garwood"; also endorsed a second time "Isabelle Garwood and C. E. Williams."

Mr. MACOMBER.—We object to this being introduced in evidence upon the ground it is immaterial, irrelevant and incompetent, and has nothing whatever to do with this case; but we will stipulate that it be admitted in evidence if counsel be fair on his part and stipulate that it had nothing to do with the purchase price; that [389] the defendants received the \$75,000 and the plaintiff has been assessed subsequent to that time \$26,000 to keep the land free from overflow, and this amounts merely to a reduction, making the assessment \$21,000;—if counsel will stipulate that, I will withdraw my objection.

Mr. HEWITT.—We will make no stipulation to

that effect because of the very nature of the assessment.

The COURT.—The objection is overruled, and it may be received.

(The document is marked Defendant's Exhibit "H.")

Mr. MACOMBER.—We note an exception.

### EXCEPTION No. 6.

At the close of the afternoon session of the court on Wednesday the 28th day of July, 1915, and while this action still pending and yet unfinished, and while there were still a number of witnesses to be examined, the Honorable Wm. H. Sawtelle, Judge presiding, stated to respective counsel that he would be compelled to depart for Arizona upon the following day, and would not be able to hear any further testimony in said action, and he then and there requested that counsel enter into a stipulation to the effect that all remaining testimony be taken by a commissioner selected for that purpose, and that after the remaining testimony should be concluded it should be certified to him, together with the entire record to his home in Arizona, and that he could communicate his decision in the action to the Honorable Judge Van Fleet who would thereupon cause judgment to be entered in said cause with the same force and effect as though he, himself, were personally present. Such a stipulation was duly agreed upon and entered into by the respective parties; and counsel for plaintiff then and there stated to the Court that he desired the Court to render findings when making his [390] decision, and then and there counsel for plaintiff re-

quested the said Court, Honorable Wm. H. Sawtelle, Judge presiding, to make findings of fact at the time he rendered his decision in said action. The said Court, Honorable Wm. H. Sawtelle, Judge presiding, then and there refused to grant the request of plaintiff, and stated that he would not make findings of fact in said action, because of the fact that the request for findings had not been made before the commencement of the trial. To the Court's said action in refusing the request of plaintiff for findings of fact the plaintiff then and there duly excepted. The action of the Court in refusing to make findings of fact, and the failure and refusal of the Court to thereafter make findings of fact and conclusions of law, is hereby assigned as error by the plaintiff in this action.

WHEREFORE the said plaintiff prays that the judgment in favor of defendants and against the plaintiff herein be reversed, and that said District Court of the United States, in and for the Northern District of California, Second Division, be directed to grant a new trial in said action.

Dated Aug. 14th, 1916.

LLOYD MACOMBER,  
Attorney for Plaintiff.

Receipt of Copy of the Within Assignment of Errors in the Case of Garwood vs. Scheiber et al., No. 15,701, in the District Court of the United States, for the Northern District of California, is hereby admitted, this 7th day of August, 1916.

ARTHUR E. MILLER and  
A. H. HEWITT,  
Attorneys for Defendants.

[Endorsed]: Filed Aug. 15, 1916. Walter B. Mal-  
ing, Clerk. [391]

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[Title of Court and Cause.]

**Order Allowing Writ of Error.**

Upon motion of Lloyd Macomber, attorney for the plaintiff in the above-entitled action, and upon the filing of the petition for writ of error and assignment of errors.

IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the bond to be given by the plaintiff upon said writ of error be and the same is hereby fixed at the sum of one thousand dollars, and that upon the giving of said bond all further proceedings in this court be suspended, stayed, and superseded, pending such determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 15th, 1916.

WM. C. VAN FLEET,  
Judge.

Receipt of Copy of the within Order allowing Writ of Error, in the Case of Garwood vs. Scheiber et al., No. 15,701, in the District Court of the United States for the Northern District of California, is hereby admitted this 17th day of August, 1917.

ARTHUR E. MILLER and  
A. H. HEWITT,  
Attorneys for Defendants.

[Endorsed]: Filed Aug. 15, 1916. Walter B. Mal-  
ing, Clerk. [392]

[Title of Court and Cause.]

MASSACHUSETTS BONDING AND INSURANCE COMPANY, HOME OFFICE, BOSTON, MASSACHUSETTS.

**Bond on Writ of Error.**

WHEREAS, heretofore, to wit, on the 18th day of February, 1916, judgment was made and entered in the above-entitled action, against the plaintiff, and in favor of the defendants therein named, and judgment for costs of suit was, at the same time, rendered against the plaintiff in the sum of something less than eight hundred dollars, to wit, approximately seven hundred and ninety dollars; and

WHEREAS, the plaintiff is dissatisfied with the said judgment of the Court and desires to prosecute a writ of error to the United States Circuit Court of Appeals and has procured from the Court an order directing that a writ of error issue in said action, staying proceedings therein, and directing that plaintiff file with the clerk of the court a bond, in the sum of one thousand dollars;

NOW, THEREFORE, the undersigned, in consideration of the premises, does hereby undertake and promise, upon the part of said plaintiff in error, that said plaintiff in error will pay whatever costs are legally incurred by the defendants in error in said above-entitled action, upon said writ of error; and does further promise and undertake to the effect that, if [393] the said judgment in said action, as heretofore rendered, should be affirmed, said plaintiff in error will fully pay the judgment for costs heretofore

rendered against her and in favor of the defendants in said above-entitled action; and, to the end herein stated, does undertake and is firmly bound to pay all such sums, not, however, exceeding the sum of one thousand (1,000) dollars.

Dated at San Francisco, Cal., this 16th day of August, 1916.

[Seal] MASSACHUSETTS BONDING & INSURANCE CO.

By JOHN H. ROBERTSON and  
S. M. PALMER,

Attorneys in Fact.

State of California,

City and County of San Francisco,—ss.

On this 16th day of August, A. D. 1916, before me, H. B. Denson, a Notary Public in and for the city and county of San Francisco, personally appeared John H. Robertson, Attorney in Fact, and S. M. Palmer, Attorney in Fact, of the Massachusetts Bonding and Insurance Company to me personally known to be the individuals and officers described in and who execute the within instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself, depose and saith that they are the said officers of the company aforesaid, and that the seal affixed to the within instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco the day and year first above written.

[Seal]

H. B. DENSON,  
Notary Public in and for the City and County of San Francisco, State of California. [394]

Approved:

WM. H. HUNT,  
Judge.

[Endorsed]: Filed August 16, 1916. Walter B. Maling, Clerk. [395]

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[Title of Court and Cause.]

**Praeipice for Transcript of Record.**

To the Clerk of Said Court:

Sir: Please prepare transcript on writ of error the same to constitute the following papers:—

Bill of Exceptions.

Complaint.

Amendment to Complaint.

Demurrer to Complaint.

Order Overruling Demurrer.

Answer to Complaint.

Stipulation Waiving Jury, and that case be tried  
by Court Without Jury.

Order Entering Judgment.

Stipulation to Bill of Exceptions and that Bill may  
be Settled and Allowed.

Assignment of Errors.

Order Settling Bill of Exceptions.

Stipulation as to Original Exhibits.

Dismissal of Action as to Frances Scheiber, Emma  
Scheiber, and Anna Scheiber.

Petition for Writ of Error.

Writ of Error.

Bond on Writ of Error. [396]

Order Allowing Writ of Error.

Citation on Writ of Error.

Return to Writ of Error.

Clerk's Certificate to Judgment-roll.

Clerk's Certificate to Transcript of Record.

LLOYD MACOMBER,

Attorney for Plaintiff.

[Endorsed]: Filed Jan. 12, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [397]

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[Title of Court and Cause.]

**Clerk's Certificate to Record on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing three hundred ninety-seven (397) pages, numbered from 1 to 397, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, filed in the above entitled cause, as the same remain on file and of record in the office of the clerk of said District Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing transcript of record is \$230.60; that said amount was

paid by plaintiff; and that the original writ of error and citation issued herein are hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 13th day of January, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [398]

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### **Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, To the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Isabelle Garwood, plaintiff in error and Joseph Scheiber, Maurice Scheiber and John Scheiber, Defendants in Error, a manifest error hath happened to the great damage of the said Isabelle Garwood plaintiff in error, as by her complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court

of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 15th day of September next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 16th day of August, in the year of our Lord One Thousand Nine Hundred and sixteen.

[Seal] WALTER B. MALING,  
Clerk of the District Court of the United States, for  
the Northern District of California.

Allowed by

WM. C. VAN FLEET.

Judge. [399]

Service of within Writ and receipt of a copy thereof is hereby admitted this 17th day of August, 1916.

ARTHUR E. MULLER and  
A. H. HEWITT,

Attorneys for Defendants.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our

said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: No. 15701. District Court of the United States Northern District of California. Isabelle Garwood, Plaintiff in Error, vs. Joseph Scheiber et al., Defendants in Error. Writ of Error. Filed Aug. 26, 1916. Walter B. Maling, Clerk. By \_\_\_\_\_, Deputy Clerk.

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**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, To Joseph Scheiber, Maurice Scheiber and John Scheiber,  
**GREETING:**

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California wherein Isabelle Garwood is plaintiff in error, and you are defendants in error, to show

cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 16th day of August, A. D. 1916.

WM. C. VAN FLEET,  
United States District Judge. [400]

Service of the within Citation on Writ of Error and receipt of copy thereof is hereby admitted this 17th day of August, 1916.

ARTHUR E. MILLER and  
A. H. HEWITT,  
Attorneys for Defendants.

[Endorsed]: No. 15701. United States District Court for the Northern District of California. Isabelle Garwood, Plaintiff in Error, vs. Joseph Scheiber et al., Defendants in Error. Citation on Writ of Error. Filed Aug. 26, 1916. Walter B. Maling, Clerk.

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[Endorsed]: No. 2924. United States Circuit Court of Appeals for the Ninth Circuit. Isabelle Garwood, Plaintiff in Error, vs. Joseph Scheiber, Maurice Scheiber and John Scheiber, Defendants in Error. Transcript of Record. Upon Writ of Error

to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed January 13, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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[Title of Court and Cause.]

**Order Extending Time to and Including October 16,  
1916, to File Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered that the plaintiff in error may have to and including October 16, 1916, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 15, 1916.

WM. W. MORROW,  
Judge, U. S. Circuit Court of Appeals, for the Ninth  
Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Oct. 16, 1916, to File Record Thereof and to Docket Case. Filed Sep. 22, 1916. F. D. Monckton, Clerk.

[Title of Court and Cause.]

**Order Extending Time to and Including November 16, 1916, to File Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered that the plaintiff in error, Isabelle Garwood, may have to and including the 16th day of November, 1916, within which to file the record on writ of error in the above-entitled cause, and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 10th, 1916.

WM. B. GILBERT,

Judge of the United States Circuit Court of Appeals  
for the Ninth Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 16, 1916 to File Record Thereof and to Docket Case. Filed Oct. 10, 1916. F. D. Monekton, Clerk.

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[Title of Court and Cause.]

**Order Extending Time to and Including December 16, 1916, to File Record and Docket Cause.**

Good cause appearing therefore, it is hereby ordered that the plaintiff in error, may have to and including December 16th, 1916, within which to file the record on Writ of Error, and docket the cause in the United States Circuit Court of Appeals, for the Ninth Circuit.

ERSKINE M. ROSS,

United States Circuit Judge.

Dated November 14th, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 16, 1916, to File Record Thereof and to Docket Case. Filed Nov. 14, 1916. F. D. Monckton, Clerk.

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[Title of Court and Cause.]

**Order Extending Time to and Including January 16, 1917, to File Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered that the plaintiff in error may have to and including the 16th day of January, 1917, within which to file the record and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit upon writ of error in the above-entitled action.

Dated December 14, 1916.

WM. B. GILBERT,  
Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to January 16th, 1917, to File Record Thereof and to Docket Case. Filed Dec. 16, 1916. F. D. Monckton, Clerk.

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[Title of Court and Cause.]

**Order Extending Time to and Including January 16, 1917, to File Record and Docket Cause.**

Good cause appearing therefor it is hereby ordered that the plaintiff in error may have to and including the 16th day of January, 1917, within which to file the

record and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit upon writ of error in the above-entitled action.

Dated Dec. 11th, 1916.

ERSKINE M. ROSS,  
Circuit Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to January 16th, 1917, to File Record Thereof and to Docket Case. Filed Dec. 15, 1916. F. D. Monckton, Clerk.

No. 2924. United States Circuit Court of Appeals for the Ninth Circuit. Garwood vs. Scheiber et al., Five Orders Under Rule 16 Enlarging Time to January 16th, 1917, to File Record Thereof and to Docket Case. Refiled Jan. 15, 1917. F. D. Monckton, Clerk.

No. 2924.

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IN THE

**United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT.

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ISABELLE GARWOOD,	}
<i>Plaintiff in Error,</i>	
vs.	
JOSEPH SCHEIBER and MORRIS SCHEIBER and JOHN SCHEIBER,	
<i>Defendants in Error.</i>	}

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**BRIEF ON BEHALF OF PLAINTIFF  
IN ERROR**

By MR. MACOMBER.

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*Filed this.....day of February, A. D. 1917.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

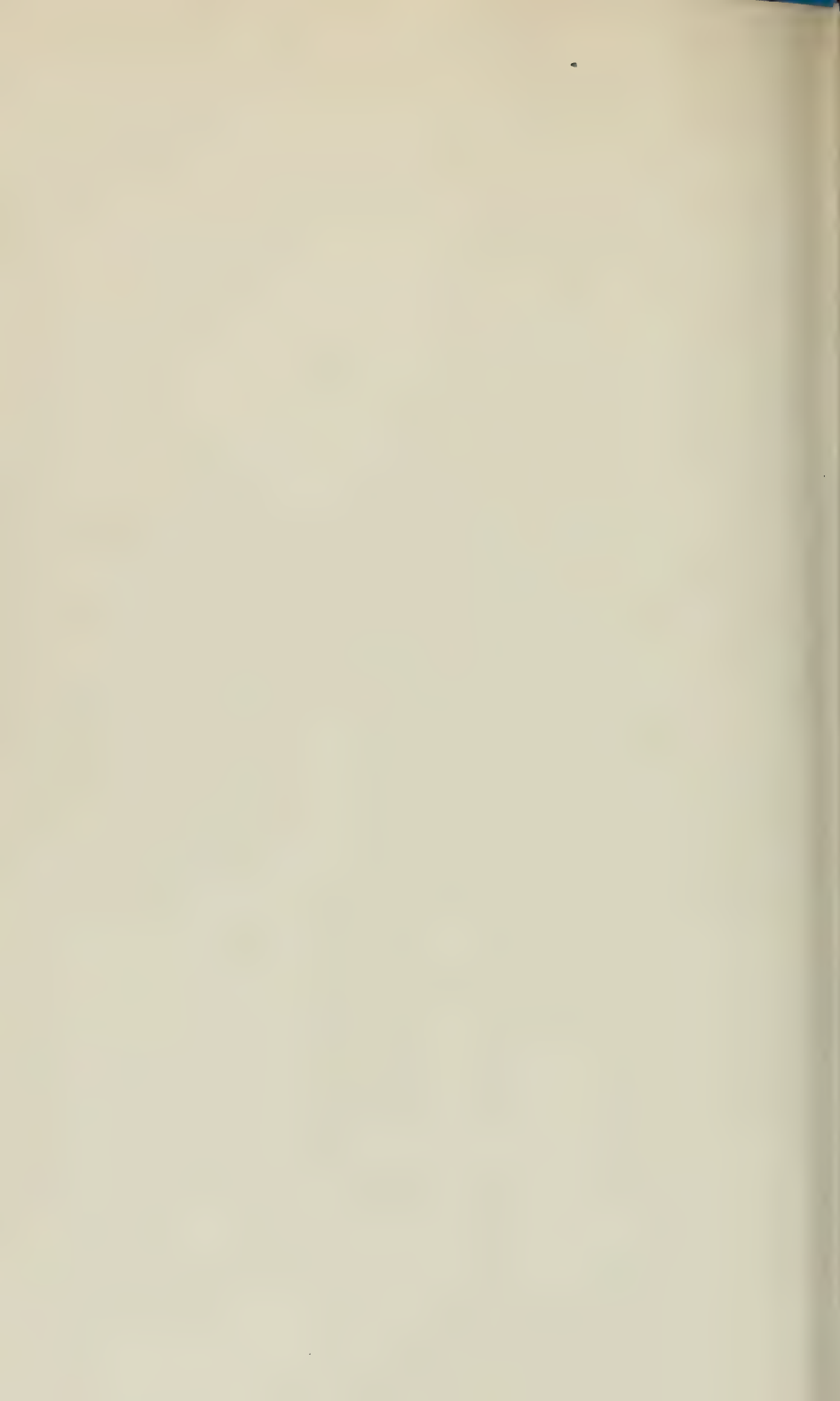
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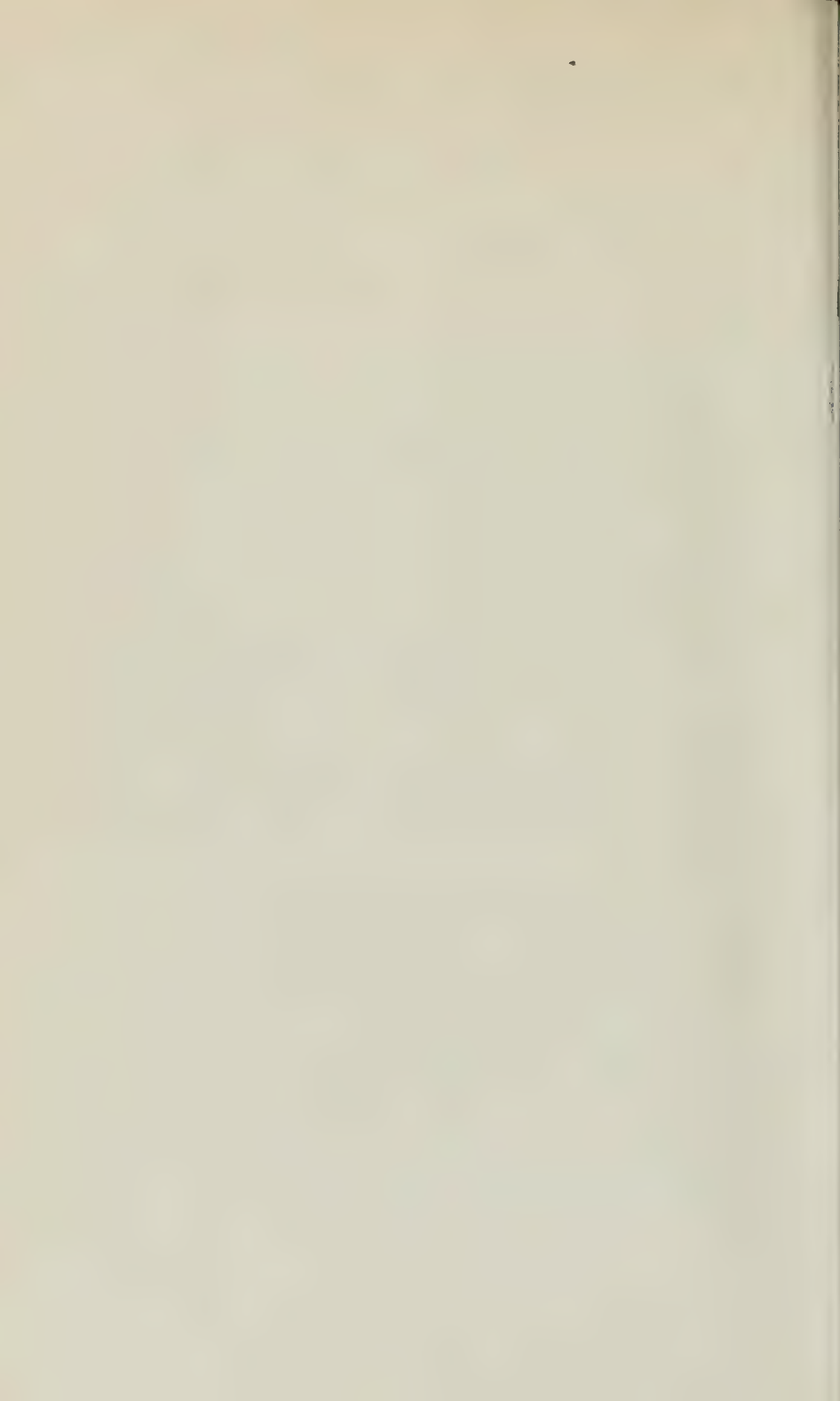
**F. D. Monckton,**  
Clerk.



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No. 2924.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

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ISABELLE GARWOOD,

*Plaintiff in Error,*

vs.

JOSEPH SCHEIBER and MORRIS  
SCHEIBER and JOHN SCHEIBER,  
*Defendants in Error.*

---

### BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

This action was brought to secure an abatement in the purchase price of land sold to the plaintiff. The land is situated in Sutter County, California, on the east side of the Feather River, about two miles south of the town of Nicolaus. Jurisdiction is based upon diversity of citizenship, the plaintiff being a citizen of a state, and the defendants being aliens. The complaint counts upon deficiency in quantity and also upon deficiency in quality. The case was tried in the District Court for the Northern District of California, the Hon. Wm. H. Sawtelle, of Arizona, judge presiding, and without a jury. He made a general finding

in favor of the defendants. There was no opinion filed nor any findings of fact. The cause was brought to this Court on writ of error.

### STATEMENT OF THE FACTS.

Stated in the concrete, the facts are as follows: In the month of September, in the year 1911, the plaintiff, a citizen of the State of New York, was sojourning in California, and happened at that time to be in the City of Sacramento. Through the sale of some securities, there had recently been put into her hands the sum of six thousand dollars which required some kind of investment, and she thought to invest it in land. With this end in view she called at the office of a concern, doing business at that time in Sacramento, known as the California Colonization Company, a corporation, but composed of only three members or shareholders—Mr. Crane, Mr. Dike and Mr. Green. These three gentlemen, doing business at that time under the firm name and style of "California Colonization Company," represented, and were the agents of, the vendors in the sale of land from which this action arose. Mr. Green was absent from Sacramento during the period of the negotiations, and the sale was effected by Mr. Crane and Mr. Dike, assisted by a sub-agent in the person of Mr. Harry K. Brown. On the occasion of her first visit to the office of said agents, the plaintiff told them that she would not consider any proposition they might make to her until there could be present a gentleman in whom she had great confidence, and who would advise her, and upon whose

judgment she would rely. At this time the plaintiff was engaged to marry a man by the name of F. I. Ramos, a physician of New York City, and a man about fifty years of age. He was a graduate of Harvard, and had formerly been an officer in the English Army, and was a man of considerable education and experience. In response to a wire from the plaintiff, Dr. Ramos came to Sacramento, and, upon his arrival, the plaintiff took him to the office of Messrs. Crane and Dike and introduced him to them as her betrothed. It seems that Dr. Ramos and Mr. Crane were both men of convivial habits, as they would frequently leave the plaintiff to go to the bar for refreshments. The plaintiff took Ramos to the office of Messrs. Crane and Dike on Wednesday, the 20th day of September, 1911, and on that same day Mr. Crane, and Mr. Bucholz, who drove the automobile, took the plaintiff and Ramos down the Sacramento River to look at some land. On the return trip to Sacramento in the afternoon, they passed near a saloon, and the three men, Crane, Bucholz, and Ramos, left the plaintiff sitting alone in the machine, and went to the saloon where they remained for twenty or thirty minutes. After leaving the saloon the three men started to discuss alfalfa land, and then, for the first time, the land in Sutter County was mentioned to the plaintiff. The following day, Thursday, the 21st day of September, 1911, the plaintiff, in company with Ramos, Mr. Dike and Mr. Bucholz, made the trip to the land in Sutter County. The following Monday, September 25th, 1911, at the urgent solicitation and advice of Ramos,

and only five days after it was first mentioned to her, she signed the contract to buy the land and paid a deposit of five thousand dollars. She had had no idea of investing that much money, or in such a property, and she had to heavily encumber herself to raise the money. It afterwards developed that Messrs. Crane and Dike had secretly paid Ramos the sum of fifteen hundred dollars, as a stipend for inducing the plaintiff to buy the land. The plaintiff was entirely ignorant of land and alfalfa, and she had never had any experience in buying land, and had never had any experience in business dealings of any kind, and these facts were known to the defendant's agents, Crane and Dike. The plaintiff made but one visit to the land before signing to buy it, and the defendants and their agents then showed plaintiff only the clear and level portion of said land and assured her that it was all of that character. The land was represented to plaintiff as being six hundred acres of the finest alfalfa land in the State, and was sold to her at \$125 an acre, making an even \$75,000. And it was represented to be free from overflow. Mr. Dike, and also her confidential adviser, Dr. Ramos, assured her that she could cut it up and sell it in small parcels and make three times what she paid for it. It was in the belief that these statements were true, and upon the counsel and advice of Dr. Ramos, that plaintiff bought the land. At the time she bought the land, plaintiff believed that she was getting six hundred acres of first class alfalfa land. All she got, however, was a tract containing not more than four hundred and fifty acres

that could be used for any agricultural purpose whatever. The absolute shortage amounted to about seventy or eighty acres; that is to say, she did not get more than five hundred and thirty acres of land in any event. Of that five hundred and thirty acres, all but four hundred and fifty acres lay outside of the levee, and consisted of sand and gravel beds and swamp, and is generally conceded by all the testimony to be absolutely worthless for any agricultural purpose. During the wet season it is for long periods of time entirely submerged. In regard to the swamp land lying outside of the levee, the evidence is clear and uncontradicted to the effect that no one ever told her about it, but on the contrary led plaintiff to believe that the levee constituted the western boundary of her land, and that the six hundred acres stretched away to the eastward. Dr. Ramos died several months after the sale.

Before proceeding further it will be necessary to familiarize the Court with the topography and general features of the land in question. By looking at Defendant's Exhibit J, a photograph of which appears on page 435 of the Transcript, and a photograph of which is also appended to this brief, and also at Defendant's Exhibit I, at page 434 of the Transcript, very good maps of the premises can be seen. On the map, Defendant's Exhibit J, the land will be observed as the largest one of the tracts, and is the shaded portion running northwest and southeast through Section 13, and also embracing the northeast quarter of Section 24. The Court will also observe a nar-

rower strip resembling a wing, or propeller blade, stretching away across the "cut-off" to the west of the northwest quarter of Section 13. The Court's attention is called to a rather thin line running from the little square representing the town of Nicolaus at the upper and northerlymost portion of the map, and proceeding in a southwesterly direction, and joining the Feather River at the land marked "D. Donohue." The line crosses the land involved herein between the words "Isabelle" and "Garwood." This line represents what is called the old levee, and it was the only levee there at the time the land was sold to the plaintiff. All of that part of the tract which lays to the north or west of that levee is abandoned swamp land. In the early days of California the channel of the Feather River in that locality was much deeper than it is now, and levees were almost unnecessary. In the early days the river followed the bend indicated by the dotted lines and marked "Old Channel." The description of the tract at that time followed the meanderings of the river around the bend to the sharp point at the west close to the word "old." By that description the tract actually did contain six hundred acres, or, to be exact, 609.9. As years went by, however, the river straightened its course at that point, and the levee was built along the course indicated on the map, and the narrow wing-like portion of the tract became, in time, the permanent bed of the river. In this way 150 acres of the tract were abandoned to the swamp, and about seventy acres of the tract were taken away

completely. (Tr. 146 and 147). By Section 2349 of the Political Code, the Feather River is navigable as far as Marysville. By Section 830 of the Civil Code, no one but the State can own land beneath a navigable stream. What land that there is to the north and west of the old levee is swamp and heavy jungle, and full of holes, and is saturated with water for practically the entire year. That land is of no agricultural value whatever, and defendant's valuation experts themselves placed no value on it except for the wood that happened to be growing on it. The Court's attention is directed to a zig-zag line running northeasterly across the tract in the southeast quarter of Section 13, of the map appended to this brief. This line does not appear on the original exhibit; but it does appear on one of the other exhibits in the case. It is simply used here to indicate the dividing line between the land which is conceded to be as represented, and that portion at the southeasterly end of the land which is not as represented. The rectangular portion lying between the levee and the zig-zag line consists of about two hundred and fifty acres, and this portion is not mentioned in the complaint, it thereby being conceded to be as represented. All that portion lying south of the zig-zag line, consisting of about two hundred acres, is not as represented in that it is not river-bottom land, but on the contrary is a heavy clay with but a few inches of sediment on the surface. It is not sub-irrigated, and it is not commercially practicable to raise alfalfa on it without artificial irrigation. That

portion of the land is also of very low contour, and at the time the land was sold to plaintiff those two hundred acres at the lower end of the tract were subject to overflow to such an extent that the raising of alfalfa was commercially impossible. Plaintiff asks for an abatement on the purchase price on those two hundred acres of sixty-five dollars per acre. Although the land was represented to the plaintiff as being free from overflow, she has been compelled to expend more than twenty thousand dollars in reclamation assessments to keep the water off.

#### **SPECIFICATION OF ERRORS RELIED UPON.**

The following errors will be relied upon by the plaintiff in error, viz.:

The decision and judgment of the Court in the above-entitled action is error, and said decision and judgment is against law and unjust, in this, namely, said decision is entirely unsupported by the evidence, and is contrary to the evidence, and the particulars in which said decision and judgment is contrary to the evidence, and in which the evidence is insufficient to support said decision and judgment, are as follows, to wit:

The evidence shows that the land involved in the issues of this action was sold to the plaintiff by the acre and not in gross.

The evidence shows that said land was sold to the plaintiff, and that she bought the same, as six hun-

dred acres at the agreed price of one hundred and twenty-five dollars per acre.

The evidence shows that said land was represented to plaintiff and sold to her as six hundred acres of first class alfalfa land, which was protected from overflow by levee; and that plaintiff bought said land upon and by reason of those representations.

The evidence shows that not more than two hundred and fifty acres were as represented.

The evidence shows that instead of there being six hundred acres there was an absolute shortage of more than seventy acres.

The evidence shows that instead of there being six hundred acres to said land of a character best adapted to the raising of alfalfa, there were only four hundred and fifty acres which could be used for any agricultural purpose whatever, and that there was not more than four hundred and fifty acres of said land which had any agricultural or commercial value. The evidence shows that not more than four hundred and fifty acres of said land had ever been used by defendants for agricultural purposes, and that there were not more than four hundred and fifty acres which could be used for any agricultural purposes.

The evidence shows that of the four hundred and fifty acres which might be used for agricultural purposes, not more than two hundred and fifty acres could be used for growing alfalfa, and that the remaining two hundred acres was subject to overflow

to such an extent that the raising of alfalfa thereon was a commercial impossibility.

The evidence shows that of the four hundred and fifty acres of said land which plaintiff actually received which was capable of being used for agricultural purposes, the two hundred acre portion thereof which was subject to overflow was not worth more than sixty dollars per acre, and that plaintiff was damaged to the extent of sixty-five dollars per acre for each and every one of said two hundred acres.

The evidence shows that defendants and their agents took plaintiff upon said land, but that in so doing they were careful to show her only the portion thereof which could be used for agricultural purposes, and purposely refrained from showing her the swamp land outside of the old levee, and purposely refrained from showing her that more than seventy acres of said land was at that time beneath the channel of a navigable river, and for that reason not their property and impossible of being conveyed by them, and said defendants and their agents purposely refrained from advising plaintiff of the fact that not more than four hundred and fifty acres of said land could be used for any agricultural purpose.

The evidence shows that plaintiff has been damaged in the sum of more than twenty-one thousand dollars which she has had to pay in reclamation assessments to reclaim and protect from overflow land which in said sale to her was represented to her as being free from overflow.

The evidence shows that notwithstanding this ex-

penditure of money for reclamation purposes plaintiff still has only two hundred and fifty acres of land which is as was represented to her.

The evidence shows that said land was represented to plaintiff as being subirrigated (meaning self-irrigated), and that no irrigation would be necessary for the raising of alfalfa; and the evidence shows that the same two hundred acres which were hereinbefore stated to be worth but sixty dollars per acre, that is to say, the two hundred acres at the southeasterly most end of the tract, has so little subirrigation that it is not commercially practicable to attempt to raise alfalfa thereon without artificial irrigation.

The evidence shows that the plaintiff, at the time the said land was sold to her, was a woman without any business experience or understanding, and without any experience or understanding of any character in reference to land or farming, and without any experience or understanding whatever in reference to matters appertaining to said land or the purchase thereof, and that she fully believed and relied upon the representations of defendant's agents; and the evidence shows that these facts were well known to defendants' said agents.

The evidence shows that in purchasing said land plaintiff was guided by and acted upon the advice and counsel of a friend and adviser, one F. I. Ramos, with whom plaintiff occupied a confidential relationship—with whom she was engaged to be married—which fact was at all times well known to defendants' agents who represented defendants in

said sale; and the evidence shows that, in so far as the selection of said land was concerned, said F. I. Ramos was the confidential agent of the plaintiff, which said fact was at all times well known to defendants' said agents.

The evidence does not show that said F. I. Ramos was the agent of the plaintiff for any purpose whatsoever other than to advise her in respect to what land she should or should not buy; and the precise extent of the power and agency of said F. I. Ramos for the plaintiff was well known to the defendants' said agents.

The evidence shows that defendants' said agents bribed and corrupted plaintiff's said confidential agent and adviser, said F. I. Ramos, by secretly paying to said F. I. Ramos the sum of fifteen hundred dollars, and that by reason of the said bribery and corruption of plaintiff's said betrothed and confidential agent and adviser, plaintiff was misadvised and misled to her prejudice and financial loss and damage in the sum and amount prayed for in her complaint in said action.

The evidence shows that the said land was represented to plaintiff as being "River Bottom" land, and as being subirrigated; and the evidence shows that not more than the aforesaid two hundred and fifty acres were of that character.

The evidence shows that the said land is of the following character and value, and was of the following character and value at the time of said sale, that is to say:

(1) The two hundred and fifty acres of said land lying immediately east and south of the old levee is of a character practically the same as was represented by said defendants' agents, and that said two hundred and fifty acres was at said time worth not more than the price plaintiff paid for it, to wit, one hundred and twenty-five dollars per acre.

(2) That the remainder of said land lying at the southeasterly end of the said tract were not as represented by defendants' said agents, either in respect to overflow, or in respect to subirrigation, or in respect to the character of the soil, and said two hundred acres was at the time of said sale worth not more than sixty dollars per acre.

(3) That the remainder of said land, to wit, all of that which lies outside, or northwest of the old levee, is not as represented in any respect whatsoever, and that the sixty or seventy acres of land which was actually there, and which plaintiff actually received, is useless for any agricultural purpose, and is commercially valueless.

The complaint in this action alleges that the said land in question was represented and sold to plaintiff as a certain specified number of acres of a certain specified character of land at a certain specified price per acre. The complaint alleges that there are certain acres missing, that is, that there is an absolute shortage from the number of acres represented and agreed upon. The complaint also complains and alleges that a large number of acres of the tract are not as represented, to such an extent that those acres

are unfit and unusable for any agricultural purpose and commercially worthless. The complaint further complains and alleges that a very large portion of the land, about two hundred acres, is not as was represented, and, while not agriculturally valueless, is not worth more than sixty dollars per acre. The remaining portion of the tract, about two hundred and fifty acres, is not mentioned in the complaint, it being thereby admitted that that portion of the land is practically in accord with the representations which were made to plaintiff at the time of the sale. The complaint in this action was framed, and seeks to recover, upon the theory that the plaintiff is entitled to compensation, at the agreed price per acre, for all acres missing and for all acres commercially worthless, and that plaintiff is also entitled to compensation and reimbursement to the extent to which the other acres complained of fall below the character and quality represented to the plaintiff at the time of the sale. One of the defenses interposed by the defendants was to the effect that, disregarding any representations made by the sellers, and ignoring any agreed price per acre which there might have been between seller and buyer, if it could be proven that the land in its entirety, including that portion uncomplained of, was worth the money plaintiff paid for the land, the plaintiff had received the equivalent of the money which she had parted with, and had, therefore, suffered no damage. Over the objection and exception of the plaintiff the Court allowed the defendants to put in evidence, outside of the contract

between the parties, to the effect that the land in its entirety, including that portion uncomplained of in the complaint, was worth the full amount which plaintiff had parted with under the transaction. The Court allowed a number of witnesses to testify for the defendants, that the land in its entirety was worth the sum of seventy-five thousand dollars which plaintiff had paid. This action of the Court in allowing that testimony is hereby assigned as error, and the text of the evidence and proceedings had in respect to that testimony and ruling of the Court are as follows:

Questions asked Charles F. Silva:

Q. Now, Mr. Silva, do you know what the market value of that real property, the Scheiber Brothers' ranch, bought by Miss Garwood, was on the first of November, 1911?

Mr. MACOMBER.—One moment. What do you refer to, the entire land?

Mr. MILLER.—Yes.

Mr. MACOMBER.—You asked him if he knew?

A. Yes, I do.

Mr. MILLER.—Q. What was the market value?

Mr. MACOMBER.—We object to the question; we object to any testimony being taken as to the ranch in its entirety, upon the ground that it is incompetent, immaterial and irrelevant, and not within the issues of this case, and has nothing to do with this controversy.

The COURT.—The objection is overruled.

Mr. MACOMBER.—We note an exception.

## EXCEPTION No. 3. (Tr., p. 286.)

(Questions asked G. A. WESSING.)

Q. Did you know the value of the Scheiber property or the Garwood property in 1911? A. Yes.

Q. Taking the ranch as it stood there as a whole at that time, what was its valuation?

Mr. MACOMBER.—Now, one moment, if your Honor please, in order to save time, it will be understood that my objection made yesterday to the value of the ranch in its entirety or the value of the property not described in the complaint will run to all these questions?

The COURT.—Yes.

Mr. MACOMBER.—Subject to the same ruling?

The COURT.—Yes.

Mr. MACOMBER.—I note an exception.

## EXCEPTION No. 7. (Tr., p. 307.)

(Questions asked ISABELLE GARWOOD, the plaintiff.)

Q. Now, Miss Garwood, about three months after you got this place did Mr. Charles Silva offer to take it off your hands at the price you paid for it?

Mr. MACOMBER.—We object to that as immaterial, irrelevant, and incompetent and nothing to do with this case whatever; it does not make any difference what offer was made to her.

The COURT.—When was that?

Mr. MILLER.—About three months after the purchase of the property.

The COURT.—I will overrule the objection.

Mr. MACOMBER.—We note an exception.

EXCEPTION No. 2. (Tr., p. 222.)

(Questions asked CHARLES F. SILVA.)

Mr. MILLER.—Q. Mr. Silva, did you on the occasion of a visit to the ranch with Miss Garwood, shortly after her purchase of the Scheiber property, offer to pay her \$75,000 for that ranch?

Mr. MACOMBER.—We object to the question on the ground that it is immaterial, irrelevant, and incompetent.

The COURT.—The objection is overruled.

Mr. MACOMBER.—Exception.

EXCEPTION No. 4. (Tr., p. 286.)

A. Yes.

Irrelevant documentary evidence allowed by the Court:

Mr. HEWITT.—We now offer in evidence a certified copy of the judgment-roll in the case of Isabelle Garwood vs. L. M. Curtis et al., a record of the Superior Court of the County of Sutter, State of California, together with all endorsements on the several papers constituting the judgment-roll, it being an action of plaintiff to correct and quiet the title to the property which she purchased of the defendants in this action.

The COURT.—Who are the parties defendant?

Mr. HEWITT.—There are about forty or fifty of them, I should judge, if the Court please. It was a

proceeding brought under Sections 749, 750 and 751 of our Code, and the object of introducing it is for two purposes; first, the contract entered into between plaintiff and defendants provides if there are any defects in the title that they will be rectified, if your Honor please, to the extent of \$250 expenses toward carrying it out; the second is that the complaint in this action is a verified complaint, verified by plaintiff herself, and shows which she says under her own verification she is the owner of; that is, it gives a description of it.

Mr. MACOMBER.—Now, if your Honor please, we object to this upon the ground that it is immaterial, irrelevant, and incompetent, and has nothing to do with this case.

The COURT.—It may be received in evidence.

Mr. MACOMBER.—We note an exception.

#### EXCEPTION No. 5. (Tr., p. 302.)

Mr. HEWITT.—I now offer in evidence a certified copy of the warrant issued by reclamation district No. 1001, bearing date December 30, 1911, for the sum of \$5,106.43, together with all endorsements on the warrant in question, the warrant being endorsed, "Pay to the order of Isabelle Garwood, Levee District No. 6, by J. J. McNamara, Chairman, Julius Rolfe, Clerk," also endorsed "Isabelle Garwood"; also endorsed a second time "Isabelle Garwood and C. E. Williams."

Mr. MACOMBER.—We object to this being introduced in evidence upon the ground it is immaterial,

irrelevant and incompetent, and has nothing whatever to do with this case; but we will stipulate that it be admitted in evidence if counsel be fair on his part and stipulate that it had nothing to do with the purchase price; that the defendants received the \$75,000 and the plaintiff has been assessed subsequent to that time \$26,000 to keep the land free from overflow, and this amounts merely to a reduction, making the assessment \$21,000;—if counsel will stipulate that, I will withdraw my objection.

Mr. HEWITT.—We will make no stipulation to that effect because of the very nature of the assessment.

The COURT.—The objection is overruled, and it may be received.

(The document is marked Defendant's Exhibit "H.")

Mr. MACOMBER.—We note an exception.

EXCEPTION No. 6. (Tr., p. 303.)

## ARGUMENT ON THE ERRORS OF LAW.

### Argument As To Exceptions Number Three and Number Seven.

The Court erred in admitting evidence as to the value of the land in its entirety or in reference to that portion of the land not mentioned in the complaint. As against this contention, the defendants urge the doctrine as to the measure of damages laid down in *Smith vs. Bolles*, 132 U. S. 125, 33 L. ed., 279, and *Sigafus vs. Porter*, 179 U. S. 116, 44 L. ed., 113. We

wish to say at the outset that we have absolutely no quarrel with *Smith vs. Bolles* or *Sigafus vs. Porter*. In fact, as we will presently show, we rely on that doctrine. *Smith vs. Bolles* was a case where a party bought 4000 shares of mining stock for \$1.50 a share, therefore paying \$6000.00 for the stock. The complaint alleged that the stock was wholly worthless, but that if it had been as represented it would have been worth ten dollars a share, or \$40,000.00. On that theory the plaintiff asked for \$40,000.00 damages. He was seeking to recover damages resulting from an unrealized speculation. He asked for \$40,000.00 damages where he had parted with only \$6000.00. The situation was practically the same in the case of *Sigafus vs. Porter*. In that case the plaintiff bought a gold mine for \$400,000.00, which turned out to be worthless. The complaint alleged that if the property had been as it was represented to be it would have been worth One Million Dollars, and, as it was worth nothing, they asked for One Million Dollars damages. In each of these cases the sale was in gross, and in each case the plaintiff sought to recover an amount far in excess of what had been lost. Now let us look at the case at bar. There is an absolute deficiency of seventy-five acres, and then there are seventy-five acres that are agriculturally worthless, thereby making the moral shortage 150 acres. Now let us assume that our complaint had been framed on the same theory as the complaint in *Smith vs. Bolles* and *Sigafus vs. Porter*. Assume, for instance, that alfalfa land, of the character of that which was represented to the

plaintiff, is worth one thousand dollars an acre. As the land is one hundred and fifty acres short, it would necessarily be worth just \$150,000.00 less than it would have been had it been as represented. In our complaint, therefore, we would allege our damage to be just \$150,000.00, notwithstanding the fact that the plaintiff had bought the land for \$125.00 an acre, and had parted with only \$75,000.00 altogether. Proceeding on that theory, we would be seeking to obtain damages for the loss of the bargain, or, as it is expressed in *Smith vs. Bolles*, we would be trying to get damages "covering the fruits of an unrealized speculation." But that is just where our case differs from *Smith vs. Bolles* and *Sigafus vs. Porter*. The plaintiff in this case is not trying to recover for the loss of a bargain, nor is she trying to get damages "covering the fruits of an unrealized speculation." The plaintiff in this case is merely asking for a reduction in the purchase price corresponding to the deficiency in the land. The complaint in this case is framed on the theory that plaintiff is entitled to an abatement of the purchase price to the extent of the money which she paid for acres which she did not get. Defendants agreed to give plaintiff 600 acres of land, at the stipulated price of \$125.00 per acre, and the complaint is framed upon the theory that she is entitled to recoup \$125.00 for each acre that they failed to give her, and that she is also entitled to compensation to the extent that any of the acres may fall below \$125.00 in value by reason of their not being of the character and kind of land represented

to her. This point of difference which we have just pointed out between the case at bar and the two authorities mentioned is fundamental. In *Smith vs. Bolles* and *Sigafus vs. Porter* the sales were in gross. In the case at bar the sale was by the acre (See authorities listed under Argument to Point that Sale was by the Acre, and not in Gross). In *Smith vs. Bolles* and *Sigafus vs. Porter* the transactions out of which those cases grew were of a highly speculative and gambling character. In those cases the plaintiff put up one dollar in the *hope* of winning two. But in this case the plaintiff merely sought to purchase a certain number of acres of a certain specified character of land at a certain specified price per acre, and that price per acre must, for this case at least, be presumed to be the prevailing market value for land of that character. The transaction in the case at bar was of a staid and legitimate character, and the plaintiff is entitled to recover back money which she paid out in good faith for acres which she never received. Let us take this illustration: Suppose that an agent of the Government should go out to buy mules. He goes to the ranch of a stock grower, and sees in a corral a large number of fine-looking mules. He says to the stockman, "How much do you want for those mules?" The grower replies, "\$125.00 a head." The agent then says, "How many are there?"; and the grower tells him that there are 600 mules in the corral. The agent multiplies \$125.00 by 600 and finds that it is just \$75,000.00; and he gives him a check on the spot, and instructs the grower to deliver

the mules at a certain point. The mules are delivered, but when counted it is found that there are only 450 head of mules. An action is commenced against the stock grower to recoup for the purchase price of the 150 mules which were paid for but never received. He defends the action by seeking to introduce evidence that the mules were actually worth \$200.00 a head instead of \$125.00, and that therefore the 450 mules which the Government actually got were worth more than \$75,000.00, and therefore the Government had got its money's worth, and having got its money's worth had suffered no damage. Could there be found a judge in the land who would call it good law to thus allow the man to admit his falsehood in respect to the number of mules, and then avoid the consequences of his untruthfulness by repudiating his contract as to the price? Can there be any possible distinction, either legal, equitable, or moral, between the case of the mules and the case at bar? There is another viewpoint which can be properly taken of the case at bar. *Smith vs. Bolles* states that the measure of damages in a case of that kind is the difference in value between what was paid by the purchaser and what was actually received by the purchaser. We find no fault with that general statement; and, as a matter of fact, we rely upon it. Now, what is the value of that which the purchaser received? Did the vendee and vendors not agree upon the value, namely \$125.00 an acre for first-class, river-bottom, subirrigated, alfalfa land? Must we be compelled to repudiate that agreement, and go out and

look for witnesses to testify as to the market value of the land? Must it not be presumed that the figure of \$125.00 an acre was fixed and agreed upon by the parties with due regard to the prevailing market conditions and value of land at the time and place? And must not the price per acre agreed upon by the parties be taken by the Court as being, not only the best, but the only criterion of the value of the land? And if the price and value as fixed by the parties was \$125.00 an acre, must not the actual value of the tract be obtained by making a proportionate diminution at the agreed price per acre for each acre missing? And must there not be also a proportionate diminution for each acre that falls below the value of \$125.00 by reason of its not being of the character agreed upon? How can the vendors fall back upon the land uncomplained of and say that that is of greater value than that agreed upon in order to make up for the shortage, when they have already sold that portion to the vendee for \$125.00 an acre? To allow a defendant to admit his untruthfulness in respect to the character or quantity of the land, and avoid, or endeavor to avoid, the rightful consequences of his acts, by repudiating his agreement in respect to the price, would be to encourage untruthfulness and dishonest dealing. The only questions which the Court is concerned with in the case at bar are the following: "Is it true that the understanding between the parties was that the land consisted of six hundred acres at the agreed price of \$125.00 per acre?" "Is it true that the plaintiff actually bought it under those

terms, conditions, and representations?" "Is it true that the land is deficient in the respects claimed by the plaintiff?" If those questions are answered in favor of the plaintiff she is entitled to an abatement on the purchase price; and any extraneous testimony regarding the value of the land uncomplained of is entirely outside the issues and immaterial. If those questions should not be answered in favor of the plaintiff she would have no case in any event.

We will now cite a few cases to back up the reasoning we have just presented. One of the best cases, a Federal case entitled *Kell v. Trenchard*, we will reserve to the last.

The case of *Sigafus v. Porter*, one of the two leading cases relied upon by the defense, cites the case of *Howes v. Axtel*, 74 Iowa 400, 37 N. W. 974, as being one of the state cases applying the doctrine of *Smith v. Bolles*. In the case of *Howes v. Axtel*, the tract was represented to the plaintiff as being 84 acres, but it turned out to be a trifle under 76 acres, there being a deficiency of about eight acres. The plaintiff sued to recover \$265.00 damages. Verdict and judgment was for the plaintiff. The land was sold to the plaintiff for \$2520.00, which was thirty dollars an acre for the 84 acres represented to be in the tract. The court instructed the jury that the plaintiff's damage was the difference in the value of the land represented and agreed upon before the sale by the parties (that is, 84 acres at thirty dollars per acre, making \$2520.00) and the value of the land as it actually was, that is, considering the actual number of acres. The language of

the court is not as clear as it might be; but the substance of the decision is perfectly plain. The substance of the decision is that the measure of the plaintiff's damage is the difference between that which the plaintiff parted with and that which he received under the contract, and that the value of what he received is obtained by multiplying the contract price per acre by the true number of acres, in other words that the actual value of the land, as it is, is simply the contract price, *considering the actual number of acres*. This case lays down the identical rule enunciated by *Smith v. Bolles* and *Sigafus v. Porter*, but with the additional rule for the ascertaining of the actual value of the land in cases having this point of difference.

We will quote from the opinion in *Howes v. Axtell*, as follows:

"The twelfth instruction directs the jury that the price agreed upon is to be taken as the value of the 84 acres of land. This is correct. When parties by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them. The instruction directs that the value of the land as it is found, *considering its real quantity*, is to be deducted from the value as settled by the agreement of the parties, and the difference will be plaintiff's damages. This rule is just, as *it gives plaintiff compensation*, and nothing more. See *Hallam v. Todhunter*, 24 Iowa, 167." (All italics ours.)

*Howes v. Axtell*, 74 Iowa 400 (1888), 37 N. W. 974.

If the court will turn to page 123 of volume 179 of the United States Reports, it will find *Howes v.*

*Axtell* cited as one of the cases in state courts applying the rule of *Smith v. Bolles*. *Howes v. Axtell* does apply the doctrine of *Smith v. Bolles*, and it also decides that in cases of the character of *Howes v. Axtell* the only way that the court can arrive at the actual value of the deficient land is by looking to the agreement of the parties. Land values are often uncertain and elusive quantities, and it seems to us that it would be a strange and anomalous rule of law that would permit a party to solemnly contract in reference to the value of land, and thereafter go into court and request the court to ignore that agreement in order to relieve him from liability for false statements in reference to the quantity of the land.

We will cite a few state cases, after which we will take up what we consider to be the most important case we have found, the Federal case of *Kell v. Trenchard*.

In *Harrell v. Hill*, the court says:

"Evidence was introduced and the fact conclusively established, that the tract of land in question, though less than one hundred and eighty acres, was and still is worth from twenty-five to thirty dollars per acre, and it is insisted by the counsel for appellee that it would be inequitable and unjust to permit the appellant to retain the quantity really existing and allow here compensation for the deficiency in proportion of the gross price agreed to be paid for the supposed quantity—one hundred and eighty acres. In response to this, we have to say that we can alone look to the agreement of the parties to determine the value of the premises in question. By their contract, solemnly entered into, they have computed the tract supposed to contain one hundred and

eighty acres at the gross price of one thousand five hundred dollars, or at the average value of eight dollars and thirty-three and one third cents per acre. The evidence of other persons as to their estimate of the value of the land must be regarded as foreign to the subject and not pertinent to the inquiry, the true rule in analogous cases being that the price paid must be regarded as the only evidence of the value."

*Harrell v. Hill*, 68 Am. Dec. 208-212, 19 Ark. 102.

In the case of *McComb v. Gilkeson*, 135 Am. St. Rep. 946, where there was a deficiency of about ten acres in a tract represented to contain 240 acres, the court says:

"As to the measure of damages in a case like this the general rule of compensation or abatement is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule. *Watson v. Hoy*, 29 Gratt. 698."

*McComb v. Gilkeson*, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 946, 947, 948.

In *Salyer v. Blessing*, the court says:

"Nor do we find available for appellant the argument of counsel that the land actually conveyed was worth more than the amount paid for the tract, assuming that it contained 1,000 acres. If this suit had been brought to recover damages for false representations as to the value or quality of the land, or upon a breach of a covenant of warranty, then the criterion of recovery would have been the difference between the value of the property as it was represented or warranted to be and its actual or market value at the time of the sale; but this action was not brought on either of

these grounds. The recovery is sought upon the ground that the vendor falsely and fraudulently represented that the tract of land contained a designated number of acres, when in fact it contained a great many acres less than was represented. This being true, the vendee failed to get what he purchased, and he received no consideration for the payment made for the deficit in the acreage. If the whole tract was sold and purchased for \$10,000 supposing it to contain 1,000 acres, the average price per acre for the tract would be, of course, \$10, and, if the vendee only secured in the purchase 697 acres, it is clear that he paid \$3,030 for which he received no consideration. \* \* \*

"In this state of case the only deceit practiced on the vendee was in the representation as to the quantity of land, and, this being so, it is clear that his right of recovery must be confined to the value of the deficit in the boundary, estimating the deficit at the price paid per acre for the boundary contracted for. \* \* \*

"The conveyance shows that Salyer represented the tract of land to contain a greater number of acres than he knew it did. Induced by these representations, Blessing paid to Salyer more money than he should have paid, and, this being so, Salyer should refund to him the money wrongfully obtained, with interest thereon from the date of the payment."

*Salyer v. Blessing* (Ky., 1913), 152 S. W. 277,  
151 Ky. 459.

In the case of *Cawston v. Sturgis*, the court says:

"But, according to the verdict of the jury, the plaintiff paid for and supposed he was buying land in area equal to little over two lots; and if, by the fraud of the defendant, he was deceived and paid for more than he actually received, it seems to us the minimum recovery should be the

amount paid for the deficiency, irrespective of the actual value of the true tract. This rule enables a vendee, who, relying upon the false and fraudulent representations of his vendor as to the quantity of land purchased, pays for land he does not receive, to recover back, in an action for damages, the amount of money paid on account of such fraud. It works substantial justice, and is amply supported by authority. *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *Smith v. Kirkpatrick*, 79 Ga. 410, 7 S. E. 258; *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600; *Parker v. Walker*, 12 Rich. (S. C.) 138; *Flint v. Lewis*, 61 Ill. 200; *Hallam v. Todhunter*, 24 Iowa, 166; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205."

*Cawston v. Sturgis*, 29 Oregon 331, 43 Pac. 656.

In the case of *Tyler v. Anderson*, the court says:

"If the tracts do not contain the number of acres which the vendor represented them to contain, the defendant is entitled to an abatement out of the purchase money for so much as the quantity falls short of the representation."

*Tyler v. Anderson* (1886), 106 Ind. 185, 6 N. E. 600.

In the case of *Estes v. Odom*, the court says:

"The theory that the vendee must be satisfied if he got in land the worth of his money is altogether wrong. He was entitled to have what he bought and paid for, and if the fraud of the other party deprived him of a part of the same so considerable that the fraud is manifest *prima facie*, or fairly suggested as probable, by the grossness of the deficiency, the minimum recovery should be the amount paid for the deficiency, with interest thereon from the time of the payment. If the true tract, as it proved to be, was,

on account of being so small, worth less than it would have been as part of a larger tract which the vendee supposed he was getting and had a right to expect, this difference would be recoverable, no matter how valuable the true tract was."

*Smith v. Kirkpatrick*, 79 Ga. 410, 7 S. E. 258;  
*Estes v. Odem* (Georgia, 1893), 18 S. E. 357,  
 358, 91 Ga. 600.

We will now take up the case of *Kell v. Trenchard*, 142 Fed. 20. The facts of this case were: Trenchard purchased from Kell, *in one transaction*, certain property, as follows: Certain land, with certain timber thereon, and a mill thereon with certain lumbering equipment, and also certain railway equipment for handling the timber on said land. It was represented by the seller and his agent that there were 35,000,000 feet of timber on the land. Sometime after the purchase, Trenchard discovered that there were only about 8,000,000 feet of timber instead of 35,000,000 feet. In defense of the action for damages, the seller, Kell, tried to defend by urging that the sale of the entire property, *being one transaction*, he could offset the shortage in timber by showing that the property, including that other than the timber, when taken as a whole, was worth all that the purchaser paid for it. The trial court took that view of the case; and, in measuring the damages, credited the seller with the *appraised* value of the other portions of the property. The circuit court of appeals was of a different opinion, and held that the action of the trial court was erroneous, and, on page 20 of volume 142 of the Federal Reporter, the court says:

"The agreement to pay \$60,000 was a single and entire undertaking for the whole property purchased; and appellant should not now be heard to say that, although there may have been fraud as charged by the appellees in the sale of the timber, the entire property was worth more than he sold the same for. This action involves solely the question of whether the appellees, by reason of the fraud practiced by the appellant and his agents, are entitled to relief because of the disparity in the quality of the timber sold. They made no complaint as to the other property; but aver that as to the timber purchased there was a warranty that there would be at least 35,000,000 feet, and that the purchase of the timber was the moving consideration that caused them to acquire the property of the appellant, it being their purpose to go extensively into the lumber business; that the appellant and his agent, Vaughn, procured the contract from them by false representation as to the quantity of timber bought; and that they, in consequence received 8,232,100 feet, instead of 35,000,000 purchased by them."

*Kell v. Trenchard*, 142 Fed. 20, 73 C. C. A. 202.

The case of *Kell v. Trenchard* arose in North Carolina. It was decided by the United States Circuit Court of Appeals for the Fourth Circuit in 1905. The opinion quotes with approval the cases of *Smith v. Bolles* and *Sigafus v. Porter* to the point that the measure of damages in such cases excludes all speculative losses. The opinion states that the measure of damages in such cases is the difference in the value between that which the purchaser parted with and that which he actually received. That is our position exactly, and we contend that *the actual value of that*

*which the plaintiff in this case received is the contract price per acre multiplied by the exact number of acres which she received.* Were it good law to disregard the terms of the contract, and take a new and *appraised* value of the portions of the property uncomplained of, it would certainly have been permitted in the case of *Kell v. Trenchard*.

If the court will glance through the portion of this brief entitled "Argument on the Proposition that the Sale Was by the Acre and Not in Gross," it will find case after case holding that in cases of deficiency the plaintiff is entitled to an abatement of the purchase price proportionate to the shortage in acres.

In closing our argument in respect to the trial court's error in allowing testimony respecting the market value of the land uncomplained of we will simply say that we defy counsel for the defendants to produce so much as one single case from any court in the world to support their position.

### ARGUMENT AS TO EXCEPTION NUMBER THREE.

Over the objection and exception of the plaintiff (Tr., p. 286), the court allowed the defendants' witness, Charles F. Silva, to testify that he had offered to pay Miss Garwood \$75,000 for the land. We submit to the court, without the citation of any authorities that the action of the court in allowing that testimony was reversible error. The testimony was entirely irrelevant, incompetent, and immaterial. What possible bearing could any offer that he might have

made, subsequent to the sale of the land to her, have upon the question as to whether or not the defendants in this action had given the plaintiff all that was represented to her? Assume that it was proper for the court to disregard the contract of the parties in respect to the price of the land, and take an appraised value of the land, would an offer to buy be any evidence of the value of the land? We submit that it is too elementary to permit of serious discussion that that is not the proper way in which to establish the value of land. The plaintiff herself vehemently denies that he ever made any such offer; but for the purpose of our argument we must assume it to be true that he did make the offer. Suppose that he actually did make such an offer: a dozen things might have transpired to cause him to make the offer—a dozen things having absolutely no bearing on the question as to whether or not there had been any misrepresentation on the part of the vendors or their agents. A railroad might have been projected across the land, and a townsite planned for that particular spot. He might have had some particular private reason for wanting that particular land, and have been willing to give several times its value in order to acquire it. Gold might have been discovered on the land, or some peculiar mineral, or agricultural, or industrial possibility might have become manifest in reference to that particular land, or land in that vicinity. We will again submit to the court that an offer to purchase real estate at any particular price is no legal evidence of the value of the land; and even if it were evidence of the value of the land it would

be entirely immaterial here for the reason that the value of that portion of the land uncomplained of is outside the issues of this case.

### **Argument As To Exception Number Two.**

Over the objection of the plaintiff, the court (Tr., p. 222) allowed the defendants to ask the plaintiff on cross-examination if Mr. Charles Silva had not offered to buy the place from her at the price she paid for it. As no exception appears after the ruling of the court on this objection, we will not argue it except to say that the question is identical with exception number three, and, by the same reasoning applicable there, the ruling of the court in this instance was error.

### **Argument As To Exception Number Five.**

Over the objection and exception of plaintiff, the court allowed the defendants to introduce in evidence (Tr., pp. 301, 302) a certified copy of the judgment role in an action brought by the plaintiff in this present action to quiet title to the land which the defendants had sold her. Could that record be of any possible materiality or relevance in determining whether or not fraud or misrepresentation had been practiced by the defendants? In that suit she might have claimed ownership to the whole of Sutter County, or to the whole of the State of California, for that matter, but would her doing so be any evidence that she had actually received that much property from the

defendants in this action, or would it be any evidence respecting the issues involved in this case?

**Argument As To Exception Number Six.**

Over the objection and exception of the plaintiff, the court allowed the defendants to put in evidence a reclamation district warrant payable to the plaintiff in the sum of \$5,106.43. (See Tr., p. 302.) About the time that the defendants sold the land to the plaintiff very extensive reclamation work was being contemplated, and the actual work was started very soon after the sale. Although Mr. Dike, the vendors' agent, had represented the land to the vendee to be free from overflow, and the agents' circular (see Tr., p. 433) represented the land to be free from overflow, nevertheless the vendee was, very soon after the sale, assessed for reclamation work in the sum of \$26,000. (See Tr., p. 187.) This warrant, or script, as it was called, was simply a credit, in the amount of its face value, on this assessment of \$26,000. She never got any money on this warrant—it was simply a credit; it simply cut her assessment down that much, making it approximately \$21,000. That is, she had to pay out \$21,000 for reclamation work for the land which had been represented to her as being free from overflow. The admission of this warrant in evidence by the court was purely erroneous. If it had been introduced for the purpose of impeaching the witness in reference to some relevant assertion or denial which she had made in her testimony, it would have been

admissible, but only in the event that she had been confronted with it on cross-examination. We can not possibly see how it could be admissible as a part of the defendants' general defense.

### **ARGUMENT ON THE FACTS OF THE CASE.**

In its consideration of the facts in this case we neither ask nor expect the court to weigh evidence. Our position in reference to the facts is that, even though all the facts testified to by witnesses for the defense be taken as true, they nevertheless do not constitute a defense as against the facts proved by the plaintiff. In our discussion of the facts, the only point on which we wish to argue is in reference to the corruption of Ramos. As to all the other points we will be content by merely directing the court's attention to the evidence as it appears in the record. In quoting from the evidence we will confine our quotations to such testimony as is not contradicted, and if we should quote testimony which is contradicted we will so state at the time. In discussing the testimony, we will first consider the representations which were made to the plaintiff; and after that we will consider the character of the land which she received. We will then take up the general conditions and features of the transaction; and after that we will discuss the corruption of the plaintiff's confidential agent, F. I. Ramos.

Messrs. Crane and Dike, doing business as California Colonization Company, were the authorized agents of the defendants. On pages 258 and 259 of the Transcript the witness Dike testifies that "before the

deal was completed we received a written authorization to make the sale" and that "The sale was ratified and confirmed by the Scheiber Brothers," and that "They paid us commission which amounted to \$3750.00," and that "The commission was previously agreed upon."

The land was represented and sold to plaintiff as 600 acres, and at the agreed price of \$125.00 per acre. On page 254 of the Transcript Dike testified, to-wit, "We did effect a sale to Miss Garwood of a ranch belonging to Scheiber Brothers which we represented to contain six hundred acres, three hundred of which was in alfalfa, and the balance in pasture land." On page 257 of the Transcript the witness Dike admits that the land was represented to her as 600 acres and that it was all level. On page 261 Dike testifies, "The arrangements of the sale were that we should sell the property for \$75,000.00, or \$125.00 an acre, out of which we were to receive 5% commission." On page 107 of the Transcript the following question was asked of the witness Crane, viz.: "Q. You were present, Mr. Crane, during the conversation held with Miss Garwood and Mr. Dike. What was said with reference to the quality; was it first-class alfalfa land, or good, bad, or indifferent?" On page 108 the witness answers, viz.: "It was represented as being first-class alfalfa land by Mr. Dike." Immediately following that answer is this question, viz.: "Mr. Macomber: Q. You know that of your own knowledge?" "A. Yes, sir." "Q. Mr. Crane, at what price per acre was that land put up?" "A. At

\$125.00 an acre." On pages 98 and 99 of the Transcript, the witness Harry K. Brown testifies that on Saturday night, the 23rd day of September, 1911, he was present at a meeting with Miss Garwood and the agents who sold her the land. He testifies, "That night after dinner we met—at the meeting after dinner there were present Mr. Dike, Mr. Crane, Doctor Ramos and Miss Garwood and myself—five of us. We talked about what could be done with this land. We represented to Miss Garwood that this land was particularly adapted to alfalfa and dairy business and that there were 600 acres of it. Mr. Dike made those representations my best recollection is. He said that the land consisted of 600 acres of the very finest alfalfa land. It was stated to Miss Garwood by all three parties at that meeting that she could not obtain anything better in alfalfa than it was—than those 600 acres. There was nothing said about any of the land not being as good as some of the rest of the land. As far as I remember it was all represented as being uniformly of the finest kind, first class." Later, on page 99, the witness, in answer to the question as to whether the land was put up to her as a sale in gross or a sale at so much per acre, testified: "A. The whole amount at \$125.00 an acre." Later, on the same page, in reply to a leading question, he said that it was put up to her and talked to her as \$125.00 an acre. On pages 165 and 166 of the Transcript the plaintiff, Isabelle Garwood, testifies that she and Mr. Crane and Dr. Ramos and Mr. Bucholz went out to look at land, and that on the return trip to Sacra-

mento they, Crane and Bucholz, talked to her about the land that she afterwards bought. On page 166 she says: "Mr. Bucholz said, 'If you are buying alfalfa land, you ought to buy a dairy; I can sell you 600 acres of the finest land for alfalfa in this State at \$125.00 an acre.'" That statement of Bucholz was binding upon the defendants, first for the reason that it was made in the actual presence of Mr. Crane, the authorized agent, without any dissent from him, and, secondly, Bucholz himself was an employe of Messrs. Crane and Dike, and, as a sub-agent, he actually received a part of the commission paid by the vendors. (See testimony of A. L. Crane, last two lines on page 117 of the Transcript, viz.: "Q. And you did pay a commission to Mr. Bucholz? A. Yes.") On page 174 of the Transcript, the plaintiff testifies that she in company with Dr. Ramos and Mr. Dike and Mr. Brown were returning to Sacramento in an automobile, and that the conversation was concerning the land which she afterward bought. She testifies: "Q. What did they say about the land in Sutter County, the Scheiber Brothers' Land, with respect to sub-irrigation?" "A. They said that it was thoroughly sub-irrigated." "Q. Did they tell you any of it was not sub-irrigated?" "A. They said it was all sub-irrigated, and 600 acres of the finest alfalfa land in the State." "Q. Who told you that?" "A. They all told me." (See also page 172 of the Transcript.) On page 171 of the Transcript, the plaintiff testifies (speaking of Mr. U. L. Dike): "A. He said, 'The Natomas land overflows, and the Natomas people will

not sell their land under \$250.00 an acre, they have got to stop that overflow, too'; and he said, 'You will get your land for \$125 an acre and it is already stopped!' On page 176 of the Transcript, the plaintiff testifies: "And then I said, 'Well, wont you get them to take off the animals, I do not want the animals, I only want the land to cut up,' and Mr. Dike said, 'Do you suppose when you pay \$125 an acre for 600 acres of land, which is exactly \$75,000, do you expect to have an animal thrown in to an acre?'" On page 219 of the Transcript the plaintiff testifies: "It was represented to me that I could cut up 600 acres of the very finest alfalfa land, and that is what the farmers wanted." On pages 187 and 188 the plaintiff identified the circular which Messrs. Crane and Dike gave to her describing the land, and the circular was introduced in evidence, and marked "Plaintiff's Exhibit 5." A photograph of the page of that circular, containing the item respecting the land in question, appears on page 433 of the Transcript. The land in question is indicated by the heavy ink lines on both margins. The item in the circular reads in part, viz.: "600 acres, in Sutter County. River bottom land, east bank of the Feather River, near Nicholas. Is protected from overflow by levee. Under cultivation, mostly alfalfa, there being three hundred acres in alfalfa, balance adapted to growth of alfalfa, ——— The soil is deep rich sediment loam, and lies practically level. No irrigation is required for alfalfa." This circular, containing statements respecting the land, given to the vendee by the vendors' agents is

competent, relevant and material evidence. (See case of *Connecticut Mut. Life Ins. Co. v. Carson*, 172 S. W. 69, 186 Mo. 221, quoted at length in this brief in the argument to the point that all the representations made to the plaintiff were statements of fact upon which she could rely, etc.) Nowhere in the record are any of the above quoted representations in respect to the quantity and price of the land contradicted.

Now, the land was represented to the vendee to be free from overflow. See the statement in the circular, "Is protected from overflow by levee" (Tr., p. 433), and see testimony of plaintiff just quoted above in respect to statements of U. L. Dike.

On page 172 of the Transcript the plaintiff testifies: "Q. What did he say about it with respect to overflow? A. He said there was no overflow; he said that 'Your levee is built and you will get \$5000 back, and the people whose levee is not built they have got to spend money but you have got nothing to pay, you will get \$5000 and the Scheibers told me the same thing.'"

The complaint alleges (Tr., p. 6) "that the plaintiff visited the land on the 21st day of September, 1911, and that plaintiff while at said ranch inquired of said defendants as to the boundaries of said property, and asked them to tell her where said ranch extended to, and Morris Scheiber pointed to the levee on the East bank of the Feather River and called plaintiff's attention to the same and stated that the Western boundary of said ranch ran along said levee northward to a

point near a white house and from there eastward along a certain fence, which he indicated, to a point beyond a grove of oak trees, which he also indicated, and from there in a general southerly direction, and thence, at right angles, in a Western direction to a levee." This allegation is sustained by the evidence. We ask the Court to read the testimony of the plaintiff on pages 168, 169, 170 and also on pages 206 and 211.

If the Court will read the plaintiff's testimony on those pages it will see that the defendants, themselves, lead the plaintiff to believe that the land was all of the character which the plaintiff could see from where she stood near the ranch house and that the levee constituted one of the boundaries of the tract. In particular do we call the Court's attention to the testimony of the plaintiff on page 206, where she says: "Q. You asked them to point out the boundaries? A. Yes. Q. What did they say? A. They said right along the green line to the white house, meaning their stable, running down that line to the trees and across from the trees up to the grove." On page 211 of the transcript plaintiff testifies: "and they said, 'There is nothing bad about the land, Miss Garwood, it is all good, clear level land like you are looking at.'" (This testimony, however, is contracted by defendants.)

Counsel for the defense have tried to argue from the plaintiff's testimony that they pointed the boundaries out as running on the other side of the trees, across the levee and that, therefore, it was her own

fault if she went away with the misapprehension that the levee was the boundary.

If the Court will read the testimony, however, on the pages which we have referred to, it will see that the plaintiff meant exactly what is alleged in the complaint, and which allegation we have herein quoted. That the defendants and their agent, Mr. Dike, lead plaintiff to believe that the levee constituted one of the boundaries of the land is plain when we read the testimony of Mr. U. L. Dike on pages 260 and 261 of the Transcript, where he says: "About the boundaries, we drove along the line of the property where the road followed the line and walked over to the line to places where it left the road and also pointed the boundary line by fences, *levee and river boundary*." In any event, it is perfectly clear, in the light of all the testimony, which we have quoted in our brief, that the plaintiff had no idea that there was any land belonging to this particular tract outside of the levee.

On pages 186 and 187 of the Transcript the plaintiff says: "It was in the early part of February, 1912, that I was told that there was only 450 acres to the place." The defendants have stated in their testimony that the plaintiff asked them what the land on the outside of the levee was good for and that they told her that it was good for wood, but it does not appear from their testimony that they told her that that land outside of the levee belonged to their tract. It is plain from the testimony of Mr. Dike on page 262 that the plaintiff never went upon the levee. On

page 262 the witness Dike says: "I went onto the levee, but Miss Garwood did not."

Then on page 263 the witness Dike says: "We did point out the boundaries and mentioned certain fences which constituted the southeast and north boundaries and the river bank represented the west boundary." By the river bank he meant the levee; this is clear when we read his testimony on page 261, where he says: "*Levee and River boundary.*"

Now, we will direct the Court to the testimony of Joseph Scheiber and we will respectfully ask the Court to read the testimony of said defendant as it appears on pages 393, 394 and 395 of the Transcript. The reading of that testimony will convince the Court that the defendant never told the plaintiff or advised her, in any way, that there was an absolute shortage to the land of 75 acres, that is, that there was that much land under the permanent bed of a navigable river, and it will also be perfectly clear from that testimony that they did not advise her that there was any land belonging to the tract outside of the levee. There is absolutely no place in the record where it appears that either defendants or their agents ever advised the plaintiff that there was any such amount of land as 25 per cent lying beyond that high embankment constituting the levee. It is perfectly clear that the plaintiff herself never knew that 25 per cent of the land lay outside of the levee, or, in fact, that there was any of the tract outside of the levee. On the contrary, it is clear that she went away from that

land with the idea that it was all to the south and east of the high embankment constituting the levee. Now, the question is, is she responsible, in view of all the circumstances of this case, for the misapprehension under which she bought the land? Does this deficiency amount to fraud or mistake such as to justify her relief? The defendants knew that there was a very large amount of land outside of the levee and a very large portion under the permanent channel. They knew that none of the land outside of the levee was of any value whatever other than a place to get wood. They admit themselves on page 397, where Joseph Scheiber testifies:

"Q. When you bought the land from the Pacific Mutual Life Insurance Company, did you consider that land west of the old levee of any particular value except for wood? You knew it could not be farmed, didn't you? A. Yes. Q. Did you consider it of any particular value except for wood? A. That is about all. Q. Its value was just as much when you sold it as when you bought it, was it not? A. Just as much. Q. You never used it for anything except for wood? A. Just for wood."

Now, should not the defendants have told the plaintiff that 25 per cent of the land lay outside of the levee and that fully one-half of that 25 per cent lay under the permanent channel of a navigable river? We will again quote from the testimony of Joseph Scheiber, page 395: "Q. Why didn't you show her how the land was just outside the old levee, Mr. Scheiber? A. She never asked me to go over there. Q. She

never asked you so you did not take her? A. Never thought of it; she did not ask me to go. Q. You did not tell her how much land there was over the levee? A. No. Q. You did not say how much? A. No."

We will again quote from the same witness on page 394, where he says: "Q. Do you know whether or not this woman knew about that land being gone when she bought the place? A. I don't know whether she knew that or not. Q. You did not point out to her across the river where there was no land? A. I pointed the lines. Q. She never went upon the levee? A. Not that I seen."

Before we close the discussion with reference to the representations which were made to the plaintiff concerning the character of the land, we wish to call the Court's attention to certain testimony given by the defendants to the effect that they told the plaintiff about overflow on the rear portion of the land. If the Court will refer to the next section of this brief, which is devoted to an explanation of the character of the land, it will see that the southerlymost 200 acres of the tract is of very low contour and subject to overflow from back water from the American and Sacramento Rivers and subject to complete inundation for many weeks at a time.

This land, previous to the reclamation work, was subject to overflow to such an extent that the raising of alfalfa on it was a commercial impossibility, because the alfalfa would be drowned out. Some of the defendants testified that they told the plaintiff that the water came up over the back land. This, we con-

tend does not excuse them unless they also told her that the overflow was such as to render the raising of alfalfa commercially impossible with the land unprotected by levees in the rear. The 200 acres complained of at the rear end of the tract are very low land and the water would back up from the American and Sacramento Rivers. According to the testimony of Mr. Peter and Mr. Ewen (see Tr., p. 124 and 225), the land would be covered with water for months at a time. By the testimony of Mr. Mulvany (Tr., p. 147), it will be seen that alfalfa could not possibly live on the land inundated for such periods of time. (See, also, Furlong's testimony, Tr., p. 235.)

It must be remembered that the plaintiff was there in September, generally the driest month in the year, and that there was no water on the land at that time. She was always told by the agents that the land was first-class alfalfa land. She was a person of no experience in land and was not dealing at arm's length with the defendants. Moreover, her agent was in the employ of the adverse party and the doctrine of *caveat emptor* has no application to this plaintiff. Their liability for the misrepresentation as to the overflow in so far as the back land was subject to overflow is not affected by their telling her what they say they did. In order to be absolved from liability, under the circumstances of this case, they should have told the plaintiff that the flooding of the back land was of such long continuing periods that the raising of alfalfa on that land was commercially impossible.

In closing this part of our brief, we will say that the plaintiff believed all that the defendants or their agents told her in respect to the land. On page 191 she testifies:

"I believed implicitly every word that they said and what they said was exactly what they showed me in their book (referring to the circular, page 233 of the Transcript), and I believed everything, otherwise I would not have bought the place."

On page 196 the plaintiff testifies:

"A. Doctor Ramos said he thought it was the best thing to buy, and pay in full price, and I said, 'all right if you think so.'"

### **THE QUANTITY, QUALITY AND VALUE OF THE LAND INVOLVED.**

If the Court will look at page 435 of the Transcript, it will see a very good map of the land in question, surrounded by the neighboring farms. Page 435 is a photograph of defendants' Exhibit "J." A duplicate of page 435 is appended to this brief.

On the map, defendants' Exhibit "J," the land will be observed as the largest one of the tracts, and is the shaded portion running northwest and southeast through Section 13, and also embracing the northeast quarter of Section 24. The Court will also observe a narrower strip resembling a wing, or propeller blade, stretching away across the "cut-off" to the west of the northwest quarter of Section 13. The Court's attention is called to a rather thin line running from the little square representing the town of Nicolaus at the

upper and northerlymost portion of the map, and proceeding in a southwesterly direction, and joining the Feather River at the land marked "D. Donohue." The line crosses the land involved herein between the words "Isabelle" and "Garwood." This line represents what is called the old levee, and it was the only levee there at the time the land was sold to the plaintiff. All of that part of the tract which lays to the north or west of that levee is abandoned swamp land. In the early days of California the channel of the Feather River in that locality was much deeper than it is now, and levees were almost unnecessary. In the early days the river followed the bend indicated by the dotted lines, and marked "Old Channel." The description of the tract at that time followed the meanderings of the river around the bend to the sharp point at the west close to the word "old." By that description the tract actually did contain six hundred acres, or, to be exact, 609.9. As years went by, however, the river straightened its course at that point, and the levee was built along the course indicated on the map, and the narrow wing-like portion of the tract became, in time, the permanent bed of the river. In this way 150 acres of the tract were abandoned to the swamp, and about seventy acres of the tract were taken away completely. (Tr., 146 and 147.) By Section 2349 of the Political Code the Feather River is navigable as far as Marysville. By Section 830 of the Civil Code of California no one but the State can own land beneath a navigable stream. What land that there is to the north and west of the old levee is swamp

and heavy jungle, and full of holes, and is saturated with water for practically the entire year. That land is of no agricultural value whatever, and defendants' valuation experts themselves placed no value on it except for the wood that happened to be growing on it. The Court's attention is directed to a zig-zag line running northeasterly across the tract in the southeast quarter of Section 13 of the map appended to this brief. This line does not appear on the original exhibit; but it does appear on one of the other exhibits in the case. It is simply used here to indicate the dividing line between the land which is conceded to be as represented, and that portion at the southeasterly end of the land which is not as represented. The rectangular portion lying between the levee and the zig-zag line consists of about two hundred and fifty acres, and this portion is not mentioned in the complaint, it thereby being conceded to be as represented. All that portion lying south of the zig-zag line, consisting of about two hundred acres, is not as represented in that it is not river-bottom land, but on the contrary is a heavy clay with but a few inches of sediment on the surface. It is not sub-irrigated, and it is not commercially practicable to raise alfalfa on it without artificial irrigation. That portion of the land is also of very low contour, and at the time the land was sold to plaintiff those two hundred acres at the lower end of the tract were subject to overflow to such an extent that the raising of alfalfa was commercially impossible. Although the land was represented to the plaintiff as being free from overflow, she has been

compelled to expend more than twenty thousand dollars in reclamation assessments to keep the water off. (Tr., p. 187.)

By the testimony of H. H. Jones, a civil engineer, the land lying to the south and east of the levee consists of 450.365 acres. If the area of the tract, as computed by its original boundary lines, was 609.9 acres, that leaves 159.535 acres of worthless land outside of the levee. On page 146 of the transcript the witness Mulvany testifies:

“There was land on that side years ago which is not there now. Probably about seventy acres, and that is in the bottom of the river. That is now in the bottom of the river.”

On page 148 he again says:

“During the past twenty-five years the river has worked south and covered about 70 acres, or more, of land of this particular property.”

The Feather River, a navigable stream at that point having changed its course, and covered seventy acres of the tract, that portion of the tract was absolutely gone. (See Sec. 2349, Pol. Code, and Sec. 830, Civ. Code.) We thus see that the actual acreage which the plaintiff received was about 540 acres instead of 600 acres. But, while the actual shortage is only about 60 acres, the moral shortage is 150 acres, because there is not more than 450 acres which have any agricultural value. There were about 90 acres outside the levee, and although abandoned land, it was not actually under the river. On page 146 Mulvany testifies:

“As to any land lying outside of the old levee,

that land in 1911 would be worth about \$10 an acre for the timber that is on it."

On page 243 the witness H. W. Furlong, an agricultural engineer, testifies that the land lying to the northwest of the levee was valueless for agricultural purposes. On page 246 he says this land is *submerged* agriculturally. On page 397 the defendant Joseph Scheiber testifies that the land lying west of the levee had never been used for any purpose other than for wood, and was of no value except for wood.

All of the land lying outside of the levee was overflow land in the most extreme degree. In the winter time it would be completely covered by the rushing torrent of the Feather River. See the testimony of Mulvany on pages 148 and 149, and see, also, to the same effect, the testimony of Scammell on page 130 of the Transcript. See, also, plaintiff's Exhibit No. 1, and also other photographs of land lying to the west of the levee.

Now, as to the rectangular piece of land extending southeast from the levee through the heart of Section 13, and as far as the zig-zag line, we will state that that is the portion of the land which is not mentioned in the complaint. It consists of about 250 acres, and is conceded to be practically as the land was represented to the plaintiff. It is of comparatively high contour, and is not subject to overflow. It is river-bottom land; that is, it is sediment, and quite rich. It is sub-irrigated, that is, the water from the Feather River percolates through it to such an extent that alfalfa can be raised throughout the year without irri-

gation. If the Court should read the testimony of the various witnesses who testified in respect to the character of the land, it will find that this particular 250 acres of which we are now speaking is of the same general character as the land which borders the river at that point, that is, which extends back toward the east from the river channel. For instance, the northerly most piece on this map is the M. Meiss farm, next below is the Drescher place, then A. Kreig, then Redfield, then Scheiber Bros., then just below the land in question is the land of W. H. Saylor, and below the Saylor land is the Borgman place. All of those farms, for about three-quarters of a mile back from the river channel, are river-bottom land and sub-irrigated. We will now take up the last portion of the tract, viz., all that portion south of the zig-zag line. This portion consists of the northeast quarter of Section 24, and the triangular fraction of about 40 acres immediately above. This land is of a different character and formation entirely from the 250 acres last described. The scientific explanation seems to be this: The Feather River, in the course of centuries, has shifted its course to and fro, gradually cutting a basin through the clay sub-soil and replacing the clay with sediment. Along the immediate course of the river the sediment has accumulated from deposits made from time to time whenever the river would get high enough to overflow its banks. For this reason the land bordering the river channel, for a half mile or mile back from the river, is higher in elevation than the land farther away from the river. For this reason

land two or three miles away from the river may be submerged in the wet season, while the land immediately bordering the banks of the river will be high and dry. (See testimony in general of witness Furlong.) Now, the quarter section at the southerly end of the ranch, and the triangular fraction immediately above, is of this low-land character. In the rainy season it would be entirely submerged for many weeks at a time. (Tr., p. 124 and p. 225.) This would be fatal to alfalfa. (Tr., pp. 147 and 235.) The 200 acres in the south end of the land is not suitable for alfalfa. (See testimony of W. H. Ewen, Tr., p. 227.) The 200 acres at the southeast end of the tract is not sub-irrigated. (See testimony of H. W. Furlong, Tr., p. 233.) To the same effect see also the testimony of I. N. Scammell on page 128 and page 129. The rear portion of the Garwood land is not sub-irrigated. It is not alfalfa land; it is grain land. (See testimony of T. J. Mulvany, on page 145.)

For a most perfect illustration of how the soil type changes along the course indicated by the zig-zag line, we will call the Court's attention to the two photographs of plaintiff's exhibits 13 and 14 as they appear on page 436 of the transcript. On page 251, Furlong says: "That line observed in the picture is the line of demarcation between the alfalfa and the indigenous weeds. The alfalfa stops; the entire ground where the picture was taken and showing the line of demarcation is not alfalfa." On page 232, Furlong says: "The 200 acres at the southeasterly end of the Garwood place is not good alfalfa land;" and on page 233

he says: "That soil is not sub-irrigated." On page 237 he tells where he was on the tract when he took the pictures just hereinbefore referred to.

Now, in reference to the value of the 200 acres which we complain of at the rear end of the tract, Mr. Mulvaney, on page 146, says that it is worth \$60 an acre; Mr. Furlong, on page 245, says that it is worth \$60 an acre; Mr. Redfield, on page 414, also places the value at \$60 per acre. However, some of the defendants' witnesses value it at more than twice that amount, and some of them actually go so far as to claim that that rear portion of the tract is sub-irrigated. In order to get at a proper estimate of the value of that rear land it will probably serve us the best to inquire as to what some of the neighboring lands of much better quality sold for at about the time of the sale to the plaintiff. If we turn to the photograph of defendants' exhibit "J" attached to this brief (see also Tr., p. 435), we will notice the land of W. H. Saylor adjoining the Garwood land on the west. Saylor's land is a triangular piece with the easterly-most point or angle ending where the lower portion of the Garwood land begins. By Saylor's testimony on page 142 we see that his land is all sub-irrigated with the exception of a small portion of the extreme easterly point. Now, on page 325 defendants' witness, John Borgman, says: "The Saylor land is *not quite* as good as the *best* land on the Scheiber ranch." Now, by the testimony of practically all of the witnesses, the sub-irrigation extends back from a half mile to a mile from the river. By looking at the

Saylor place it will be seen that it is all sub-irrigated with the exception of the small portion of the eastern point or corner. This in accordance with the testimony of Saylor, himself. Now, if we turn to page 404 of the transcript we will see that Saylor bought the land in the year 1909 or 1910 for \$100 per acre.

There we have the very best possible evidence respecting the value of land in that vicinity. If Saylor bought a tract of 128 acres of good sub-irrigated land for \$100 an acre at about the same time that the land in question was sold to the plaintiff, is that not some criterion as to the value of the inferior land lying to the east? Had the Court the time or the inclination to go through the testimony in its entirety in reference to land values in that vicinity, it would see at once that, had the plaintiff paid \$100 an acre for the 250 acres uncomplained of, and \$40 an acre for the 200 acres of poor land at the south end, and nothing for anything outside the levee, making a total of \$33,000 for the entire tract as it is, she would simply be paying the fair, reasonable market value of the land.

### **DISCUSSION OF THE GENERAL FEATURES OF THE SALE.**

On page 165 of the Transcript the plaintiff testifies: "Upon the occasion of my first visit to the office of that Company I told them that I had \$6000 and that I wanted to buy some acreage. I told them that I was simply making inquiry and would not look at anything until there was a gentleman present, in whom

I had the greatest confidence, and who would advise me. This man was Dr. F. I. Ramos. I took Dr. Ramos to the office of the California Colonization Company, and introduced him to Mr. Crane and Mr. Dike, and told them that I was engaged to be married to him. On that day, the 20th of September, 1911, we went out to look at land." On the next page, 166, she says: "They stopped and left me in the car on the levee, and the three men went over to a saloon and stayed there from twenty minutes to a half hour, a good half hour, I think it was." When the journey back to Sacramento was resumed the land in Sutter County was mentioned to her for the first time. (Tr., pp. 166, 167.) On page 186 of the Transcript plaintiff testifies: that Ramos was a highly educated man, and that she had perfect confidence in him. On pages 103 and 104 of the Transcript the witness A. L. Crane testified: "I perfectly remember the circumstances of Miss Garwood coming to our place of business. She stated that she was going to bring a man to us, and that she would not look at anything before she had this man with her. She said she would not buy anything without his passing upon it. She afterward brought this man to our office. At the time she introduced him to us she said he was her agent; she said that he would be her adviser, and she also said her relations with him would be much closer; I believe she was to be married to him; she said she was engaged to him; she told me that. The first day we went out with Dr. Ramos we took him to Andros Island, down the Sacramento River. Mr. Bucholz,

Dr. Ramos, Miss Garwood and myself made up the party. On the way back Mr. Bucholz suggested that they look at the Scheiber Brothers Ranch. When we got back to the office, I introduced Dr. Ramos to Mr. Dike, who was familiar with the Scheiber Brothers' ranch." On page 165 the plaintiff testified that the date of this first trip, just mentioned—down the Sacramento River—was on Wednesday, the 20th day of September, 1911. On page 167 the plaintiff testifies: "They telephoned to Brown, and Brown replied that he would send the papers, but that he could not come until Saturday. The next morning Mr. Dike took us to this land—Mr. Dike, the chauffeur and the Doctor and myself made up the party." No part of the testimony herein quoted is contradicted. The plaintiff's testimony in respect to the date of the first trip which she and Dr. Ramos made with Crane or Dike to look at land is corroborated by the testimony of the witness Brown on pages 97 and 98. He says: "In September, 1911, while at Berkeley, I received a telephone communication from Mr. Dike, the Secretary of the California Colonization Company in Sacramento, with reference to the land. He telephoned to me from Sacramento on the evening of the 20th of September—Wednesday, September the 20th. He wanted me to come to Sacramento. He said he had a purchaser for the Scheiber ranch, and he wanted me to give them the details. I told them I could not come until Saturday afternoon, at which time I would be through with my work. I left on the 12:30 train, and met them at Dixon. They had a machine,

and we then went to Timm's Dairy, and then on to Sacramento." At the solicitation and advice of Ramos, on the 25th of September, 1911, only five days after they first went out to look at land, the plaintiff concluded to buy the land and pay the full price; and on that day she signed the contract, and put up \$5000 deposit. On page 196 of the Transcript appears the following testimony, viz. (cross-examination by Mr. Miller): "Q. Now on the 25th of September, 1911, you concluded to buy this property, didn't you? A. Dr. Ramos said he thought it was the best thing to buy, and accept the pay in full price and I said, 'All right, if you think so.'" Then, on page 197, she says: "Q. How much did you pay them on the 25th of September? A. I paid \$5000." At the top of page 197 she says: "Q. Did you at that time conclude to accept, pay the full price? A. I did pay the full price. Q. Did you at that time conclude to pay the full price? A. Yes, on the 25th of September." On page 180 the plaintiff testifies: "I put up \$5000 for the land, the 25th of September, 1911." On pages 177 and 178 it appears by the testimony of the plaintiff that Ramos counseled and advised plaintiff to buy the land, and that he scolded her for hesitating. On pages 186 and 192 of the transcript it appears that the plaintiff was entirely without business training or experience. On page 138 of the Transcript appears the following testimony of Mr. Brown, in reference to the conversation held in Sacramento on Saturday night, September 23rd, at which time the plaintiff and Dr. Ramos and Mr. Crane and Mr. Dike and

Mr. Brown were present, viz.: "Mr. Macomber: Q. What did the plaintiff state about the land? A. She had no experience." On page 175 of the Transcript the plaintiff testifies: "I went very heavily in debt to buy this farm, I had only \$6,000. I borrowed \$32,000 in New York, and I had \$39,500 mortgage in this country, \$19,500 the first mortgage, and \$20,000 the second mortgage." On page 169 of the Transcript, while speaking of her first and only visit to the land, before signing to purchase it, the plaintiff says: "Well, I had no idea of buying the ranch."

We believe that we have made it clear to the Court (but if we have not done so a perusal of the testimony certainly will) that, just as we stated at the outset of our brief, on Wednesday, the 20th day of September, 1911, the plaintiff in this action had no thought of investing anything more than \$6000 in real estate, and that on Monday, the 25th day of September, 1911, just five days later, she signed the contract to purchase land to the extent of \$75,000. This woman, with no business experience, put herself heavily in debt to buy this large property on only five days' consideration. Must there not have been some strong controlling influence to cause her to do such a thing? She did so by reason of the advice and persuasion of her betrothed, F. I. Ramos, a man who had the greatest possible influence over her, and the said F. I. Ramos so advised and persuaded the vendee to purchase the land for the reason that he was thereby enabled to put fifteen hundred dollars in his own pocket.

## ARGUMENT IN RESPECT TO CORRUPTION OF PLAINTIFF'S CONFIDENTIAL ADVISER.

We will not take up the question of the corruption of Ramos. It is admitted in the answer of the defendants that Messrs. Crane and Dike did give Ramos \$1500, but the allegation that Ramos was bribed is met by the insinuation that the transaction was simply a scheme framed up by Ramos and the plaintiff to get the land that much cheaper. There is not only no evidence that such was the case, but the evidence is perfectly clear that the plaintiff had no knowledge of the arrangement between Messrs. Crane and Dike and Dr. Ramos. We had no means of satisfactorily proving the corruption of Ramos except by calling as witnesses the very men who were guilty of the bribery, and who were friendly with the defendants. Dr. Ramos died in May, 1912, and we could get no information from him. (See Tr., p. 186.) If the Court will read the testimony of Mr. Crane and Mr. Dike in its entirety, it will see that each of said witnesses is ordinarily hostile, and in respect to the bribery of Ramos it will be seen that they are extremely hostile. They endeavor, continually to shift the blame from one to the other. Notwithstanding their evasions and equivocations, however, the Court will see, as clear as day, that they not only gave Ramos \$1500, but they made the agreement to do so several days before the day the deal was consummated, that is, several days before Monday, the 25th day of September, 1911.

The Court will see by the testimony of both Crane and Dike that they did not tell Miss Garwood anything about the agreement with Ramos; and that in fact on the very day that she signed the contract to purchase she asked them to divide the commission with her, and they told her they would not do so, and at the same time made no mention of their existing agreement with Ramos. At that time, when the plaintiff was endeavoring to get a reduction in the price, and asking them to divide the commission with her, if the transaction with Ramos had been in good faith with the purchaser, and open and above board, would they not have talked about it and discussed it with her? Bribing an agent is not exactly a crime, but it is a trick, nevertheless, that almost every man, if guilty of it, would prefer to keep secret. If the agreement to divide the commission had been made with Miss Garwood, by and through F. I. Ramos, acting as her agent, is it not morally certain that Mr. Dike, in his deposition would have so testified? By actual count, Mr. Dike, in his depositions, has stated more than a dozen times that the agreement was made with *F. I. Ramos*, and the commission was actually paid to *F. I. Ramos*. Not once in all the times that he stated the fact has he even so much as hinted that the agreement was made with Miss Garwood, by and through F. I. Ramos acting as her agent. The testimony of the witness Dike is perfectly clear to the point that they agreed to, and did, give to *F. I. Ramos* a part of their commission. The witness Crane testified that when they gave the \$1500 to Ramos it was by a check

payable to F. I. Ramos; and he tries to excuse himself by saying that Ramos was the agent of the vendee. He says that it was his "*impression*" that she knew all about it. On page 182 the plaintiff testified concerning her first hearing of a commission being paid to Ramos, which was long after she had bought the property. The plaintiff testified on pages 183 and 215 that Ramos always denied that he had received any commission. On page 183 she says: "Q. When Dr. Ramos arrived, state what happened. A. He was very indignant. I said, 'Do you know that Mr. Brown accuses you of having received a commission?' He said, 'What and you sat and listened to him, you should have kicked him out of the house; would I listen to anybody say anything against you?'" On page 215 of the transcript the plaintiff testified: "Q. When Mr. Brown told you that did you go to the California Colonization Company or anybody else to ascertain whether or not they had actually paid the commission? A. I did not believe it, that was the end of it; I did not believe it." On page 257 of the Transcript the following questions and answers appear as quoted from a former deposition given in the state case, viz.:

"Q. By the way, you were paid by Scheiber Brothers for making the sale?

"A. Yes sir.

"Q. Your company paid Mr. Ramos some money?

"A. Yes, sire.

"Q. How much? A. Fifteen hundred dollars.

"Q. Out of your commission? A. Yes sir.

"Q. Why was that paid?

"A. Because he demanded it; he wouldn't let the sale go through unless we paid him.

"Q. What did he say about it? A. He couldn't come out there and work for his health; he would have to have something."

The witness, U. L. Dike, admits that those questions were put to him, and those answers given by him, and, on the following page, 258, he states that that testimony is substantially correct. On page 264 of the Transcript the witness, U. L. Dike, admits that he never said anything to Miss Garwood about paying a commission to Ramos until after the death of Ramos. (Ramos did not die until the following May—Tr., p. 186.) When Dike was asked why it was that he did not tell Miss Garwood of the payment of the commission to Ramos, he answered (see page 264 of the Transcript): "A. There was no reason for keeping the knowledge from her, except the usual reason that agents do not discuss division of commissions with principals." On page 273 of the Transcript Mr. U. L. Dike testifies: "When Mr. Crane told me of the agreement to divide the commission with Dr. Ramos I protested and I objected. Then Dr. Ramos showed me a card signed by Mr. Crane, the president of the company, agreeing to give Dr. Ramos one-half of the commission and when he showed me the card I consented. I don't know when this card was signed by Mr. Crane." As showing how inconsistent their testimony was, we will quote from the testimony of A. L. Crane, on page 115 of the Transcript, viz.: "I gave Dr. Ramos that card

when he came from the little office where he had been conferring with Miss Garwood, and told me they would not take the property unless I divided the commission. So we held a little meeting, Mr. Dike, and myself; Mr. Green was absent. We passed a resolution authorizing a division of the net commission, and then he asked for a verification, and we wrote it out on a card, as I remember it. We never tried to conceal the division in commission. Q. Did you ever tell Miss Garwood anything about it? A. No, sir." Then, on page 116, Crane testifies: "Q. Before the money was paid he made the demand? Q. He made the demand before the money was paid? A. Several days before. My impression was that Miss Garwood knew all about it. Q. That is all right about that part of it. He made the demand for the division and the demand was acquiesced in by you some days previous? A. Some days previous, because that was when they had agreed to take the property. Q. As a matter of fact, the agreement for a division of the commission was made some days prior to the date this \$5000 was paid? A. I think it was." Now, on page 110 of the Transcript, we find this testimony, viz.: "Q. Mr. Crane, the check that you gave Dr. Ramos the time he handed you the \$5000, as you hereinbefore testified, that was made out to Dr. Ramos? A. Yes, sir, Dr. Ramos. Q. And the check he gave you was made out by Miss Garwood? A. Miss Garwood's check. We talked with Miss Garwood at the office of the California Colonization Company. She came in frequently." Now, look at the testimony

of the plaintiff on page 176, where she says: " 'Well, wont you get them to take off the animals, I do not want the animals, I only want the land to cut up,' and Mr. Dike said, 'Do you suppose when you pay \$125 an acre for 600 acres of land, which is exactly \$75,000, do you expect to have an animal thrown in to an acre?' Those were his words. Q. Who said that? A. Dike. Q. When? A. On Monday morning, when he said he would not take off the grain. Then I said, 'Wont you divide your commission with me because I really can't spend so much money,' but he said, 'no,' 'he never divided commissions with anybody' ". Here we see the plaintiff importuning the agents to divide the commission with her, on the very day that she signed the contract and put up the \$5000 deposit, and they refuse, and stated to her that they never divide commissions with anybody. What does that mean? Only one thing—that they had made a secret agreement with Ramos some days prior, and they were purposely withholding the knowledge from her. Why did they refuse to divide the commission with her? Simply because they had already promised to divide it with Ramos, and they couldn't split it more than once. In the light of this reasoning, Mr. Crane's *impression* that she knew all about it falls to pieces completely. On page 180 and page 181 of the Transcript the plaintiff testifies that she never had any agreement with the agents for a division of the commission, and she also states that she never knew or heard of Ramos receiving any commission until

long after she bought the land, when Mr. Brown came and told her about it.

At this point it might be well to quote the testimony of the plaintiff on page 191, where she says: "Dr. Ramos and Mr. Crane were very chummy, they said they liked each other very much. They spent a portion of their time in the bar opposite the hotel. I used to see them going there. I saw them go in and out of the bar, and the Doctor told me they had been in the bar."

On page 269 of the Transcript U. L. Dike testifies: "Q. Did you tell Miss Garwood Ramos wanted fifteen hundred dollars, and you agreed to give him fifteen hundred dollars? A. No, sir." Then on page 268 appears this testimony, viz.: "Q. When did he first ask you for money? A. He never asked me for money at all? Q. Whom did he ask? A. Mr. Crane. Q. And did Mr. Crane tell you about it? Did he ever talk to you about money? A. Yes. Q. What did he say to you? A. He said that he gave Mr. Ramos a statement of the acres and that he would divide the commission with him. Q. For what? A. If they bought the property. Q. You knew Miss Garwood was buying the property, didn't you? A. We supposed she was. Q. Don't you know that you made a contract with her? A. Yes, but that was later. That wasn't the time we made the agreement with Doctor Ramos." Here we see the agent trying to excuse his action in bribing the plaintiff's agent by saying that he had entered into the agreement to give Ramos a commission before the contract was con-

summed with Miss Garwood. As a matter of law, it makes no difference when they made the agreement to divide the commission with Ramos: they knew at the time that he was the confidential agent and adviser of the plaintiff, and that she contemplated purchasing some land from them, and that she was bringing Ramos to them so that he could advise her as to what to buy. And here we see the attorney, in a manner, chiding Mr. Dike for giving money to Ramos, and that is the way he attempts to excuse himself. Is it not morally certain that if there had ever been any suggestion that this \$1500 was paid to Ramos for Miss Garwood, that he would have urged the point then and there, instead of saying what he did? Mr. Crane says that it was his *impression* that Miss Garwood knew all about the transaction. That simple statement establishes conclusively that the arrangement was made with Ramos individually. The thought that the arrangement to divide the commission was for the benefit of Miss Garwood existed in his mind as a mere *impression*. In the first place, in the light of Mr. Dike's testimony, it was impossible for him to have had that impression. In the second place, there was absolutely no ground for such an impression, and he had no right to it. So long as his knowledge in that regard existed in his mind as a mere impression, it was his duty to assure himself positively by advising Miss Garwood immediately. In applying the law to this situation, with regard to the moral requisite of the case, the court should hold it to have been the duty of defendants'

agents to fully advise the plaintiff of what they had done just as soon as they had made the agreement with Ramos—especially so in this case, where there was every possible opportunity for their so doing. According to the testimony of Crane, she was in their office frequently. (Tr., p. 110.) And especially so in this case, as in this case, although the plaintiff introduced Ramos to them as her future husband, and one in whose judgment she would rely upon, nevertheless there is absolutely nothing in the record to show any power, authorization or authority upon the part of Ramos to make a contract, or to receive money for the benefit of Miss Garwood. In other words, while he was her confidential adviser in respect to selecting the land, there was no agency established in respect to his receiving moneys or making contracts. In this case defendants' agents had no authority to give Ramos any money for the plaintiff, and Ramos had no authority to receive any money for the plaintiff, and there was no authority for any contract or agreement to be made with Ramos. Under these circumstances, and under all the facts of this case, if there was an agreement with Ramos, or something said to Ramos, in respect to a division of the commission, it immediately became the duty of Messrs. Crane and Dike to at once advise plaintiff of their action, and, they not having done so, it must be presumed that the intelligence was purposely withheld from her. If this were not the law, parties could bribe agents with impunity; liability could always be avoided upon the defense that they thought

the principal was to be the beneficiary. In a case of this kind, where it is established that money is secretly paid to a person in confidential relation, the burden is overwhelmingly cast upon the defendants to show that the transaction was in good faith. But it is not necessary to argue that the giving of this money to Ramos amounted to bribery as a question of law; the evidence clearly establishes it as a fact.

Although in this case the bribery of the plaintiff's agent is established as a matter of fact, nevertheless, in the event of a new trial being had, it would be extremely desirable to have it settled as a matter of law. Our contention in respect to the point involved is this: That where, as in the case at bar, a party is the agent and confidential adviser of a person for one certain purpose only, but not to receive money, and it is proved that the agent receives money from the adverse parties in interest, and it is not beyond the power of the adverse parties in interest to advise the agent's principal of the fact that they had given him money, it thereupon becomes their duty to so advise the principal, and their failure to do so amounts in law to an improper and corrupt influencing of the agent. That this is sound doctrine we do not believe can be disputed.

### **SHORT OUTLINE OF THE LAW AND FACTS IN GENERAL.**

Plaintiff is, and was, at the time this action was commenced, a citizen of the State of New York. (See plaintiff's testimony, Transcript, pp. 165 and

191, 223 and 224.) It is established by undisputed evidence that the plaintiff thought she was getting 600 acres of land. It is clear, as we have shown by undisputed evidence, that she got no more than 450 acres which were of any agricultural value. That leaves a shortage of 25% from what she supposed she was to get. It is true that the *actual* shortage is only about sixty acres, that is the 70 acres which according to the undisputed testimony of Mulvany lay under the permanent channel of the river, when taken from the 610 acres which the tract was supposed to originally contain, leaves 540 acres, the actual shortage therefore being 60 acres. But, although the actual shortage is only 60 acres, the moral shortage is 150 acres, there being 90 acres of unusable land outside the levee. If the land outside the levee is valueless it makes no difference whether it is actually under the river or not. The defendants argue that this sale was a contract of hazard—that she took the land just as it was, on a gamble that it might contain 600 acres or that it might contain less. By the facts of the case, and the law as it is cited in our “Argument” to the point that the sale was by the acre and not in gross, it is plain that their position can not be maintained. In support of their position counsel for the defendants cite the case of *Board of Commissioners v. Younger*, 29 Cal. 178, 179. That case, however, is antiquated and barbarous law, and has no place in an enlightened jurisprudence. But be that as it may we are in no way affected by that case. Practically all of the old cases of the character of *Board of Commissioners v. Younger* are careful to

state that the harsh doctrine does not apply where there are any confidential relations. The case of *Board of Commissioners v. Younger*, itself, calls attention to it at least two or three different times in the course of the opinion. In view of the bribery of plaintiff's agent, Ramos, their chief case has no application here. And then again, even in the absence of a confidential relation, the doctrine of *Board of Commissioners v. Younger* does not apply where the person wronged is without experience in matters pertaining to the transaction. *Board of Commissioners v. Younger* was distinguished in the case of *Watson v. Molden* (Idaho, 1905), 79 Pac. 506, wherein relief was granted for false statements as to water rights and irrigation of land made to a person unfamiliar with such matters. We will not stop to cite authorities here; we will leave them to the end of the brief; and the Court can find what it desires in the way of law under the various headings as they can be readily found in the index. By many well considered and very recent cases, the following propositions are settled law, viz.: The defendants are liable for all instrumentalities used by the agents in effecting the sale, and should have asked the agents or the purchaser as to what representations had been made before they consummated the deal. And this is true even though they had never authorized the agents to act for them in getting a purchaser. It is sufficient if they simply accepted a purchaser brought in by an unauthorized agent. See, in this brief, "ARGUMENT TO POINT THAT DEFENDANTS ARE LIABLE FOR ALL INSTRUMENTALITIES USED BY

AGENTS IN EFFECTING SALE." All the statements concerning the land made verbally by the agents and in their circular were statements of fact, and could be relied upon by the purchaser. See, in this brief, "ARGUMENT TO THE POINT THAT ALL REPRESENTATIONS MADE BY AGENTS WERE STATEMENTS OF FACT WHICH PLAINTIFF COULD RELY UPON." Sales of this character are always to be regarded as by the acre, unless the contrary is clearly established. A contract of hazard can be established only by the clearest and most convincing evidence. See, in this brief, "ARGUMENT ON PROPOSITION THAT SALE WAS BY THE ACRE AND NOT IN GROSS." The relationship between Ramos and the plaintiff was confidential in character! See authorities cited under that head in this brief. The suit brought in the state court, and afterward abandoned by the plaintiff by reason of her fear of local prejudice, is no bar to this action. See authorities cited under that head.

At the time the contract of sale was signed by plaintiff and defendants they met at the office of an attorney in Sacramento, who, it seems, according to his own testimony, acted in a sort of mutual or neutral capacity in preparing the contract of sale. The plaintiff, a woman of no business experience, testifies that she thought he was her lawyer. He says that he acted for both sides. The defendants testify that when they met at the office of the attorney the plaintiff asked them about the acreage, and they told her that "The deed calls for 600 acres, more or less, and they never had it surveyed, and they sold it the way they bought

it." The plaintiff denies this, but we will not argue the question. We will assume the facts to be against the plaintiff, that is, we will assume that the defendants actually did say to the plaintiff "We bought it as 600 acres more or less, and we never had it surveyed, we sell it as we bought it." The question now is, "Does that statement, under all the facts and circumstances of this case, make the sale one of hazard for the plaintiff?" The plaintiff had no experience. If they told her that they never had it surveyed, would that not be leading the plaintiff to believe that they were satisfied that it contained fully 600 acres? Their statement to the plaintiff that they never had it surveyed would be equivalent to a statement to her that they had no doubt as to the full acreage that the deed called for. That is one aspect of the case. But there is another aspect of even deeper significance. They said that the deed called for 600 acres. They knew that in the 600 acres mentioned in the deed there was more than 25% of the acreage outside of the levee. They knew that there was 70 acres, or more, under the river channel, and they know that, in addition to the land under the channel, there was 90 acres outside of the levee which was a swirling torrent during the winter months, and a useless expanse of sand, gravel, or jungle during the rest of the time. With that guilty knowledge on their minds are they to be allowed to come into this Court and say that the purchase by the plaintiff was a gamble—that she stood to get 600 acres or less than 600 acres? When asked why they did not show the plaintiff the land on the outside of the levee, Joseph

Scheiber answered: "A. I never thought of it; she never asked me." (See testimony of Joseph Scheiber, Transcript, p. 395.) We again ask the Court to read the testimony of defendant Joseph Scheiber, on pages 393, 394 and 395 of the Transcript. By the rule laid down in the case of *Connecticut Mutual Life Ins. Co. v. Carson*, 186 Mo. 221, 172 S. W. 69, quoted from at length in this brief, the words and representations of the agents are put into the mouths of the vendors, and, after telling the defendant that the land was free from overflow, in order to establish a contract of hazard against her, they will be compelled to show that they took every precaution to make her understand the situation in reference to the 90 acres of overflow land outside of the levee. The evidence is absolutely undisputed that the land was represented to the plaintiff as being "free from overflow," and it is undisputed that she never did know anything about it until February, in the following year. Now, the question is, "Who is to blame for her want of knowledge concerning the actual conditions of the land?" On the one hand we have a woman, absolutely ignorant of farming, agriculture, or farm land, and ignorant of business dealings of all kinds, and relying upon a man to whom she was engaged to be married, and in whom she had every confidence, and he receiving \$1,500 as a stipend for inducing her to buy the land. On the other hand we have a number of men, all of experience in the matters pertaining to the land and its value and character, and complete knowledge, or immediate means of complete knowledge, in reference to this particular

land. It is well settled by the many cases which we have cited under the various heads in this brief that ignorance upon the part of either the principal or the agent is no defense in an action of this kind. Practically all the cases cited in our argument to the point that the sale was by the acre and not in gross, state that the words "more or less," following the number of acres in a deed are of no particular significance as importing a sale in gross. If the words "more or less," when written in the deed, mean nothing other than the small variations resulting from inaccuracies in the surveying instruments, could they have any greater significance when spoken verbally? After agreeing upon the value of \$125 an acre, is there anything in the words they claim to have spoken in reference to "more or less" which would take away their moral or legal obligation to refund the purchaser her money to the extent the land fell short?

### **ARGUMENT ON PROPOSITION THAT SALE WAS BY THE ACRE AND NOT IN GROSS.**

Plaintiff's contention is that she purchased the land involved in this controversy, as 600 acres of first-class alfalfa land. Her contention is, that the sale was a sale by the acre. Defendants contend that it was a sale in gross; that she took the ranch as it was, and the fact that she got only 450 acres of land instead of 600 acres, is not a circumstance entitled to consideration. If we attempted to quote from all of the cases which we find upon this disputed question, our brief would cover many volumes. We will, therefore, confine our-

selves to what we consider to be the best cases. It is well settled that sales in gross or contracts of hazard, as they are sometimes called, are not favored in law, and in order to establish a contract of hazard, the defendant must do so by the clearest and most convincing evidence for the reason that every presumption is against him. The authorities hold that when a dispute arises as to whether or not a sale was by acreage or in gross, the deed and other contract papers involved are not conclusive evidence as to the intention of the parties, but that all of the facts, incidents and circumstances having in any way to do with the transaction or tending in any way to shed light upon it, are to be taken into consideration. Thus, for instance, the character of the land, what it was to be used for, is a factor to be considered in determining whether or not quantity influenced the sale. Also the proportion of the value of the land to the improvements thereon, is held to be another factor to be considered in determining it. If the price paid is an equal multiple of the number of acres, this also is a circumstance which the court will take into consideration; as for instance in this case, the purchase price paid was \$75,000; the number of acres represented was 600; 600 into \$75,000 goes 125 times, that circumstance tends to show that the sale was made upon a basis of \$125 per acre. The fact that the deed or other contract papers contained the qualifying words "more or less" immediately after the number of acres given, is a circumstance held to be of no consequence as arguing a sale in gross, for the reason that the words "more or less" have been con-

strued, by the courts, as being used in precaution against the reasonable percentage of error due to the mechanical inaccuracies of the surveying instruments and reckoning. Inasmuch as the percentage of error in surveying should be but a fraction of 1%, the words "more or less", cease to have any significance in a case of this kind. Many cases make the statement that where a parcel of land is sold by metes and bounds, that that circumstance is an incident tending to show a sale in gross. That circumstance, however, is exceedingly trivial as the Court well knows that in practically all sales of real estate, either farming or city, the description of the land sold is by metes and bounds. Any other form of description would have to be of a character analogous to buying a piece of cloth in a dry goods store, as where a customer at the counter says, "Give me five yards of that", and the clerk cuts him off a specified number of yards. Real estate is rarely sold in that manner, especially farms, and it is too obvious to argue that in farming land the quantity is always a governing factor. We will hereinafter cite cases however, which take this view point; that is, that although by all the title papers, the description being by metes and bounds, and followed by the words "more or less", the sale is held to be technically in gross, yet in fact by the acre. All the cases hold, as we have said before, that all the facts and circumstances of the transaction are to be brought in to shed light on the question, and all verbal representations by principal's agents are to be taken into consideration, and the cases are uniform to the point that even though, the sale is to be regarded as one in gross, nevertheless, if there

have been untrue representations as to the quantity of land, even though such representations have been innocently made, the purchaser is entitled to redress.

We will now quote from the case of *Lang v. Merbach et al.*, 105 N. W. 415, wherein the Court says:

"There is no question here as to the agent's authority, and whatever statements he made as to the acreage bound his principal. Respondent's right to recover is not limited by the fact that in the earnest money contract, and in the deed, the premises were described as containing 382 acres, more or less. The basis of this action is that the owners, through their agent, fraudulently represented the amount of acreage to be 382 acres, when in fact it was about 44 acres less. Considering the character of the premises, respondent was not called upon to ascertain for himself the exact amount of acreage, and under the circumstances was justified in relying upon those representations."

*Lang v. Merbach* (Minn. 1905), 105 N.W. 415.

We will now quote from the case of *Paul v. Swears*, 122 N. Y. S., 742, in which the Court says:

"The fact that the sale of this farm may have been in bulk and not with reference to the exact acreage does not affect this question. If there had been no fraud in this transaction, perhaps the defendant would have no grievance on the theory that he purchased the farm as an entirety and without reference to the exact number of acres which it contained. But the authorities holding that proposition do not sanction a fraud or render a vendee immune from relief when he has been made a victim thereof, even though the sale was in gross rather than by the acre. This was expressly held in *Thomas v. Beebe*, 25 N. Y. 244; the headnote reading as follows:

"When the fraudulent representations relate to

the quantity of the land, it is immaterial whether the sale is in gross or by the acre.' ”

*Paul v. Swears*, 122 N. Y. S. 742.

We will now quote from the case of *Landrum & Adams v. Wells*, 122 S. W. 215, wherein the Court says:

“The shortage of 53 acres shown in this case constitutes a deficit of more than 33 1-3 per cent. Such a loss is excessive and shows that it could not have been intended or contemplated by the parties that it would or could occur. So, whether the sale of the land was in gross or by the acre, or the loss occurred through the fraud or mistake of the vendors, certainly no court of equity should refuse relief upon such facts as are here presented. In numerous cases relief has been granted by the courts where the deficiency was as low as 15 or even 10 per cent. *Shelby v. Smith's Heirs*, 2 A. K. Marsh. 513; *Smith v. Smith*, 4 Bibb, 81; *Hazlip v. Austill*, 4 Ky. Law Rep. 982. As said in *Young v. Craig*, 2 Bibb, 270, and quoted with approval in several later decisions of this Court: ‘The equity of such case must depend upon its own peculiar circumstances. The relative extent of the surplus or deficit cannot *per se* furnish an infallible criterion; but the conduct of the parties, the date of the contract, the value, extent and locality of the land, the price, and other nameless circumstances, are always important and generally decisive.’ *Harrison v. Talbot*, 2 Dana, 258; *Hall v. Ely*, 76 S. W. 848, 25 Ky. Law Rep. 954; *Collins v. Stodghill*, 79 W. W. 185 Ky. Law Rep. 2015.”

*Landrum & Adams v. Wells* (Ky. 1909), 122 S. W. 215.

We will now quote from *Benson v. Humphreys*, 75 Va. 196, wherein the Court says:

"Every sale of real estate where the quantity is referred to in the contract and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross must be presumed to be a sale per acre. \* \* \* The language 'more or less' used in contracts of sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc. When these terms are used it rather repels the idea of a contract of hazard and implies that there is no considerable difference in quantity. \* \* \* The burden of proof is always upon the party asserting a contract of hazard for the presumption always being in favor of a sale per acre, a sale in gross, or contract of hazard, must be clearly established by the facts."

*Benson v. Humphreys*, 75 Va. 196.

We will now quote from the case of *Harrell v. Hill*, 68 Am. Dec. 208, in which the Court says:

"We are inclined to hold to the doctrine first stated, *i. e.*, that the effect of the words, 'more or less', added to the statement of quantity, can only be considered as intending to cover inconsiderable or small differences, the one way or the other, and particularly so in the case before us, for the reason that the contract of the defendant with the complainant in regard to the land was and is an executory one, being yet in *feri*, the general opinion being in such case that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words 'more or less' or 'by estimation': See 1 Sugd. Vend. 433, note 2; *Hill v. Buckley*, 17 Ves. 395."

*Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 208-212.

We will now quote from the case of *McComb v. Gilkeson*, 135 Am. St. Rep. 946, in which the Court says:

"It is well settled that courts of equity do not favor contracts of hazard, and that every sale of real estate, where the quantity is referred to in the contract, and the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale by the acre. The presumption against contracts of hazard can be effectually repelled only by clear and cogent proof, and the burden is always upon the party asserting a contract of hazard to adduce facts which clearly establish that assertion. Where the parties contract for the payment of a gross sum for a tract of land upon the estimate of a given quantity, the presumption is that the quantity influenced the price to be paid, and that the agreement was not one of hazard. Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it, but in the interpretation of such contracts the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre, wherever it does not clearly appear that the land was sold by the tract and not by the acre: *Berry v. Fishburne*, 104 Va. 459, 51 S. E. 827; *Watson v. Hay*, 28 Gratt. 698. \* \* \* A deficiency of about ten acres in a tract of land represented to contain two hundred and forty-five and one-quarter acres is not the small deficiency which the rule mentioned attributes to a variation of instruments. It is a substantial loss, and shows that a mistake has been made in estimating the quantity. There was no laches on the part of appellant in asserting his claim for abatement of the purchase money. He did so promptly after discovering the shortage. The suit was still pending

and all the parties were before the court and a large part of the purchase money unpaid. *Watson v. Hoy*, 29 Gratt. 698. \* \* \* As to the measure of damages in a case like this the general rule of compensation or abatement is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule." *Watson v. Hoy*, 29 Gratt. 698.

*McComb v. Gilkeson*, 110 Va. 406, 135 Am. St. Rep. 946, 947, 948.

We will now quote from the case of *Emerson v. Stratton*, 58 S. E. 577, wherein the Court says:

"While contracts of hazard are not invalid, they are not regarded with favor by courts of equity. Every sale, therefore, of real estate, where the quantity is referred to in the contract, and when the language of the contract does not plainly indicate that the parties intended a sale in gross, must be presumed to be a sale by the acre. *Berry v. Fishburne*, 104 Va. 459, 51 S. E. 827; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829."

*Emerson v. Stratton* (Virginia, 1907), 58 S. E. 577.

We will now quote from the case of *Wright v. Commonwealth*, 72 S. E. 106, wherein the Court says:

"It satisfactorily appears, we think, that the tract of land described in the deed as containing 90 acres only contained 83 acres. It further appears that the sale was by the acre, and not in gross; for every sale of land where the quantity is referred to in the contract is presumed to be a sale by the acre, unless the language of the contract plainly indicates a sale in gross, and this presumption can only be overcome by clear and cogent proof."

*Hall v. Graham* (Virginia, 1911), 72 S. E. 106.

We will now quote from the case of *Pack v. Whitaker*, 65 S. E. 498, wherein the Court says:

"On the principal question, whether the sale was by the acre or in gross, there is great conflict in the oral testimony; but both the written contract of sale and the conveyance describe the land as containing '50 acres more or less,' and such language constitutes a sale by the acre, unless it plainly appears that a sale in gross was intended."

*Pack v. Whitaker* (Virginia, 1909), 65 S. E. 498.

We will now quote from the case of *Salzer v. Blessing*, 152 S. E. 277, wherein the Court said:

"When a vendor in selling land represents to the vendee that the tract proposed to be sold contains a designated number of acres, and the vendee relies on these representations and makes his purchase on the assumption that they are true, he may, upon discovering that there is a deficit in the number of acres, bring an action to recover the amount due on account of the deficit, notwithstanding the sale was in gross or of a boundary of land, if the discrepancy is sufficient in quantity to justify a recovery.

"In this state the rule is that, where there is a sale in gross and not by the acre, if the discrepancy is more than 10 per cent, a suit may be maintained to recover the amount due. *Page v. Hogan*, 150 Ky. 726, 150 S. W. 801. Here the deficit is more than 30 per cent, and so, although the sale may have been of a boundary and not by the acre, the vendee is entitled to recover the difference between the number of acres actually conveyed and the number of acres paid for. This action is not based on any warranty in the deed, but upon the representations and statements made by the vendor, relying on which the vendee made

the purchase. That such a suit may be maintained is well settled. In *Biggs v. Lexington & Big Sandy R. R. Co.*, 79 Ky. 470, the court said: 'The general principle of law authorizing an action for compensation for a material deficit in land sold under a mistake as to the quantity was long since well established; but the right of recovery greatly depends upon the nature of the purchase, the circumstances, knowledge, and conduct of the parties. This right of action is based upon the contract which the law implies as the result of justice and reason and growing out of the mutual mistake of innocent parties. \* \* \* Neither of the deeds contains any warranty of quantity. The lands are described in them by metes and bounds, and "supposed to contain in the whole 3,700 acres, be it more or less." \* \* \* But this court has too often held that the remedy for a deficit, where such deeds as these exist, is based on an implied *assumpsit* to refund the money paid by mistake that results from ignorance, accident, or confidence.' In *Dye v. Holland*, 4 Bush 635, the court said: 'Although the sale of the land to the appellant was not by the acre, but in gross, the deficiency proved of  $41\frac{3}{4}$  acres in the tract, which was supposed to contain 200 acres, was beyond the range of ordinary contingency, and such as would in proper time have entitled the appellant to relief, on the ground that he acted, in purchasing the land, under a palpable mistake as to its true quantity.' To the same effect are *Nave v. Price*, 108 Ky. 105, 55 S. W. 882, 21 Ky. Law Rep. 1538; *Crane v. Prather*, 4 J. J. Marsh. 75; *Harrison v. Talbot*, 2 Dana, 258; *Boggs v. Bush*, 137 Ky. 95, 122 S. W. 220."

*Salyer v. Blessing* (Ky., 1913), 152 S. W. 277.

We will now quote from the case of *Yates et al. v. Buttrill*, 149 S. W. 348, in which the Court says:

"The testimony of the surveyor justifies the verdict that there was a shortage within the established boundary lines, and, of course, in such a case it cannot be said the value of the shortage should be determined by the value of adjacent lands lying in one direction rather than another, if indeed the value of adjacent lands is admissible at all. We think the charge quoted above submitted the correct measure of damages. This is perhaps the most serious question in the case, but we are of the opinion that where, as here, the sale is by the acre, or even in bulk and the shortage is material, the recovery for a general shortage should be proportioned to the estimated acreage or at the agreed price per acre."

*Yates et al. v. Buttrill* (Tex., 1912), 149 S. W. 348.

We will now quote from the case of *Rathke v. Tyler*, 111 N. W. 436, wherein the Court says:

"But where the sale is by the acre the differences presumed to have been contemplated by the parties are only such as are due to the errors incident to measurements by different surveyors and the variation in the instruments used, and the words 'more or less' in the deed are treated as words of safety or precaution merely, and intended to cover but slight and unimportant inaccuracies. \* \* \*

"The result of their examination is that much depends on the circumstances of each particular case, though the decisions may be separated into two general classes treating of (1) sales by the acre and (2) sales in gross or by boundaries. Again, sales by the acre may be subdivided into (1) those where in this is expressed in the conveyance and (2) those wherein this was not so expressed, but such was the understanding of the parties. In both of these classes a court of equity will grant relief if it clearly appears that

there is considerable excess or deficiency between the quantity actually conveyed and that named in the deed, even though this be followed by the words 'more or less'.

"Sales in gross or by boundary are divisible into three subclasses: (1) Those strictly by the tract, with reference to negotiation or estimated quantity of acres; (2) those in which the quantity may be referred to in the contract, but this was only by way of description, and under such circumstances or in such manner as to show that the parties intended to risk all contingency as to quantity, however much the discrepancy might be; and (3) those in which it is reasonably probable, from the price stated, in connection with the value and the extent of the discrepancy, or from extraneous circumstances, such as locality, value, price, time, and the conduct and conversation of the parties, that they did not intend to risk more than the usual rate of excess or deficiency in such cases, or than such as might reasonably be calculated on within the range of ordinary contingency. It is manifest that contracts within the first two subdivisions, in the absence of any proof of fraud, will not be interfered with by a court of equity, for the evident reason that the parties have intended to hazard the quantity regardless of the extent of any possible discrepancy. But under the third subdivision any unreasonable surplus or deficiency will entitle the injured party to equitable relief unless in some way he has waived or forfeited this right to demand the same."

*Rathke v. Tyler* (Iowa, 1907), 111 N. W. 436.

We will now quote from the case of *Boggs v. Bush*, 122 S. W. 222, in which the Court says:

"We do not regard the question as a material one in this case whether the sale was by the acre or in gross. If it was by the acre, then it does

not matter whether the deficiency is great or small; the number of acres represented must be within the boundary. If in gross, if the deficiency is so great as was probably not within the contemplation of the parties, the buyer is entitled to relief upon the same basis of computation as if the sale had been by the acre. The quantity or area of land embraced by a sale, described by metes and bounds, is, or at least may be, an essential inducement to the bargain. Farm lands are frequently, perhaps most frequently sold by the acre, or are sold at a valuation into which the number of acres enters as a material feature of the trade. While the recitation of the number of acres is a part of the description of the land, or may be, it is, not unusually, more than that. The purchaser buys not only the particular body of land, but the quantity it is represented to contain; the latter feature of the bargain affecting the amount of consideration to be paid. The unit of measure of land in this country is the acre, as of wheat it is the bushel, and of certain other articles the pound. True, the bargain in a particular instance might be without respect to such unit. In that case the principle we are discussing would not apply; but where the unit of measure is considered and treated as an element of the trade, upon which the consideration is in some part rested, it is not perceived how it can be disregarded subsequently in measuring the rights of the parties, as an immaterial matter. The addition of the qualifying clause 'more or less' relieves only the necessity for exactness. It indicates that the parties contemplated making some allowance for those inaccuracies that are usual in such measurements, and that they each took the chance of the fact being, if ascertained with accuracy, that the quantity was somewhat more or somewhat less than was represented. The difficulty arises, in administering relief upon complaint, in determining the limit. While the courts have not set a rule applicable to all cases, in Ken-

tucky no case to which our attention has been called has granted the relief where the deficit was less than 10 per cent., and none where it was refused where the deficit was as much or more than 10 per cent. In the early history of the state, when lands were cheap, and in consequence surveying was frequently attended with inaccuracies because, perhaps, it did not pay to take the time and go to the labor and expense necessary to secure greater exactness, more latitude for discrepancy was allowed. As values have enhanced, and surveying has been more carefully done, there is less reason for, and would be more injustice in, applying the rule of ancient times. The following cases are the basis for the principles advanced above: *Harrison v. Talbot*, 2 Dana, 266; *Smith v. Smith*, 4 Bibb, 81; *Shelby v. Shelby's Heirs*, 2 A. K. Marsh. 504; *Hall v. Ely* (Ky.) 76 S. W. 848; *Anderson v. Dawson* (Ky.) 118 S. W. 953; *Anthony v. Hudson* (Ky.), 114 S. W. 782; *Landrum & Adams v. Wells* (opinion delivered November 17, 1909), 122 S. W. 213."

*Boggs v. Bush* (Ky., 1909), 122 S. W. 222, 137 Ky. 95.

We will now quote from the case of *Estes v. Odom*, in which the Court says:

"If either direct fraud, or mistake so gross as to be equivalent thereto, would be suggested by such a comparison, then a recovery could be had, otherwise it could not, for 'any deficiency not so gross as to justify the suspicion of wilful deception, or mistake amounting to fraud,' is covered by the qualification 'more or less.'"

*Estes v. Odom*, 18 S. E. 355, 91 Ga. 600.

We will now quote from the case of *Cawston v. Sturgis*, 43 Pac. Rep. 656, 657, 658, wherein the Court says:

"Upon this state of the evidence, the defendant contends that, because plaintiff examined the land prior to his purchase, the means of ascertaining its quantity was as available to him as to the defendant, and, having failed to measure it or cause it to be measured, he cannot now be heard to say that he relied upon the defendant's representations, and was thereby deceived. But we think this contention is without merit. The land is of a peculiar and irregular shape, and, although plaintiff saw it before purchasing, it is manifest that, without an actual measurement by one skilled in such matters, he could not tell or even form a reasonable estimate as to its supposed area. The plaintiff, therefore, had a right to rely upon defendant's positive statement that he had the area of the lot calculated, and that it equaled  $2\frac{1}{2}$  lots, 50 by 100 feet east, and was not bound to measure or cause it to be measured for himself. To turn him out of court under such circumstances, because he did not go to the trouble and expense of having the area of the land ascertained by actual measurement, but chose to rely upon defendant's representations, would be offering a premium upon fraud and deceit. Mere knowledge of the boundaries did not charge him with knowledge of its area, so as to relieve the defendant from responsibility for his false and fraudulent representations in reference thereto. *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496; *Lynch v. Trust Co.*, 18 Fed. 486; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Jackson v. Armstrong*, 50 Mich. 65, 14 N. W. 702; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. 744. \* \* \* But, according to the verdict of the jury, the plaintiff paid for and supposed he was buying land equal in area to two lots and a half, when in truth and in fact he actually received land in area equal to little over two lots; and if, by the fraud of the defendant, he was deceived and paid for more

than he actually received, it seems to us the minimum recovery should be the amount paid for the deficiency, irrespective of the actual value of the true tract. This rule enables a vendee who, relying upon the false and fraudulent representations of his vendor as to the quantity of land purchased, pays for land he does not receive, to recover back, in an action for damages, the amount of money paid on account of such fraud. It works substantial justice, and is amply supported by authority. *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *Smith v. Kirkpatrick*, 79 Ga. 410, 7 S. E. 258; *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600; *Parker v. Walker*, 12 Rich. (S. C.) 138; *Flint v. Lewis*, 61 Ill. 200; *Hallam v. Todhunter*, 24 Iowa, 166; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205."

*Cawston v. Sturgis* (Oregon, 1896), 43 Pac. Rep. 656.

We will now quote from the case of *Tyler v. Anderson*, 6 N. E. Rep. 602-603, wherein the Court says:

"These rules more properly apply where it appears from the deed that the land was purchased by the acre, and a certain number of acres are stated, and where the deed does not contain the words 'more or less.' But, although the deed contains these words, the vendee will be entitled to an abatement in the purchase price, as against the vendor, and others with notice, or where the notes are not commercial paper, to the amount of the deficiency, where, by the fraudulent representations of the vendor as to the number of acres, he is induced to enter into a contract that he would not otherwise have entered into, and to pay, or agree to pay, more than he otherwise would have done. And especially is this so where the land is purchased at an agreed price by the acre.

"While some of the cases seem to distinguish between sales in gross and by the acre, others hold

that there is no difference where there is fraud. It was held in the case of *Thomas v. Beebe*, 25 N. Y. 244, that where fraudulent representations relate to the quantity of land sold, it is immaterial whether the sale is in gross or by the acre. It was said:

“The liability of the defendant for a fraudulent representation is as clear if the sale of the farm was in gross as if it was by the acre. The representations of the defendant may have induced the plaintiff to enter into the contract for the purchase in gross, instead of by the acre, and there would be great injustice in depriving him, on that account, of his remedy for the fraud.”

“That there may be an abatement in the purchase price, where a fraud has been practiced upon the vendee, has been many times held by the court. In the case of *Hawk v. Pollard*, 6 Blackf. 108, it was said:

“‘If the tracts do not contain the number of acres which the vendor represented them to contain, the defendant is entitled to an abatement out of the purchase money for so much as the quantity falls short of the representation.’ \* \* \*

“In the case before us it is alleged in the answer, in substance, as we have seen, that the amount to be paid for the lands was arrived at by a calculation upon an agreed price per acre; that the vendor represented to appellant that one tract contained 240 acres, and the other 80 acres; that she knew her representations to be false; and that appellant, in ignorance of the truth, believed, relied upon, and acted upon the representations thus made to him. Under the foregoing authorities, and others that might be cited, the facts so set up in the answer, if true, are such as to entitle appellant to an abatement from the purchase money in proportion to the deficiency in the number of acres of land. That the facts set up in the answer are true, is admitted by the demurrer. It results from the foregoing that the judgment must be

reversed. It is therefore reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to overrule the demurrer to the second paragraph of appellant's answer."

*Tyler v. Anderson* (Indiana, 1886), 6 N. E. 600.

We will now quote from the case of *Ludwick v. Petrie et al.*, 70 N. E. 281, wherein the Court says:

"It is the settled law in this state that if, by the fraudulent representations of the vendor as to the extent of, or the number of acres in, the tract of land about to be conveyed to him, the vendee is induced to enter into a contract that he would not otherwise have entered into, and to pay therefor more than he otherwise would have done, the vendee will be entitled to an abatement in the purchase price. *King v. Brown*, 54 Ind. 368; *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600. Nor is the vendee compelled to rescind the contract in order to recover the damage suffered through the fraudulent representations. *English v. Arbuckle*, 125 Ind. 77, 25 N. E. 142; *Nyswander v. Lowman*, 124 Ind. 584, 24 N. E. 355."

*Ludwick v. Petrie et al.* (Ind., 1904), 70 N. E. 280.

We will now quote from the case of *O'Connell v. Duke*, 94 Am. Dec. 284, 285, 286, wherein the Court says:

"It has long since been settled that the relative extent of the surplus or deficit cannot furnish, *per se*, an infallible criterion in each case for its determination, but that each case must be considered with reference not only to that, but its other peculiar circumstances. The conduct of the parties, the value, extent, and locality of the land, the date of the contract, the price, and other nameless cir-

cumstances, are always important, and generally decisive. In other words, each case must depend upon its own peculiar circumstances and surroundings.

"It is evident that in a sale per acre much less variation from the quantity intended to be conveyed would be indicative of a mistake than where a specific tract is sold by metes and bounds, the quantity of acres being mentioned merely as matter of description. But the impracticability of ascertaining the exact amount in a tract with precision, the different results that are produced by different surveyors on account of roughness of ground, variation of instruments, etc., will render a small surplus or deficit, however exactly the parties may have intended to be confined to a specific quantity, ineffectual as a basis for relief; because parties are presumed to have contracted with reference to such ordinary contingencies, and to have accepted the hazard of gain or loss. On the other hand, where a surplus is evidently contemplated by the terms of the contract, but it turns out that the surplus exceeds considerably or greatly what the proof shows was contemplated by the parties, and such excess, if known, would have materially influenced the contract, which is to be judged of from the proof, this is a mistake against which relief will ordinarily be granted, unless the injured party has been guilty of culpable negligence. In these cases, the inquiry is first to be made whether the parties have made a mistaken estimate of the quantity which materially influenced the price, and then whether, notwithstanding such mistaken estimate, they have waived the right to compensation by an acceptance of the hazard of gain or loss by the estimate. Whenever the excess or deficiency is palpable and unreasonable, and such as is shown not to have been in the contemplation of the parties, relief will be granted, unless the proof shows that the hazard of gain or loss, whatever it might be, was accepted

and entered into the contract: *Young v. Craig*, 2 Bibb, 270; *Grundy v. Grundy*, 12 B. Mon. 271.

"Contracts for the sale of land have been considered with reference to the question under discussion to be of two descriptions: 1. Where the sale is of a specific quantity, which is usually denominated a sale by the acre; 2. Where the sale is of a specific tract, by name or description, each party risking the quantity. This is called a sale in gross. In the well considered case of *Harrison v. Talbot*, 2 Dana, 258, the supreme court of Kentucky, after an able review of the authorities, and an elaborate discussion of the principles involved, reached the conclusion that 'sales in gross may be divided into various subordinate classifications: 1. Sales strictly and essentially by the tract, without reference in the negotiation or in the consideration to any designated or estimated quantity of acres; 2. Sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances or in such a manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how much soever it might exceed or fall short of that which was mentioned in the contract; 3. Sales in which it is evident, from extraneous circumstances of locality, value, price, time, and the conduct and conversations of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might reasonably be calculated on as within the range of ordinary contingency; 4. Sales which though technically deemed and denominated sales in gross, are in fact sales by the acre, and so understood by the parties. Contracts belonging to either of the two first-mentioned classes, whether executed or executory, should not be modified by the chancellor when there has been no fraud.

But in sales of either of the latter kinds, an unreasonable surplus or deficit may entitle the injured party to equitable relief, unless he has, by his conduct, waived or forfeited his equity.'

"The court of appeals of Virginia have in numerous cases held substantially the same doctrine: *Blessing v. Beatty*, 1 Rob. (Va.) 302, 303; *Quesnel v. Woodlief*, 6 Call, 218; *Jolliffe v. Hite*, 1. *Id.* 301; *Duvals v. Ross*, 2 Munf. 290. This doctrine is so well supported on principle, so thoroughly imbued with a spirit of broad and comprehensive equity, and so strongly characterized by practical wisdom, in its adaptation to the exigencies of our society, where transactions to which it is applicable are of daily occurrence, that it commends itself to our unqualified approbation."

*O'Connell v. Duke*, 29 Tex. 299, 94 Am. Dec. 282.

We will now quote from the case of *McGhee v. Bell*, 70 S. W. 497, wherein the Court says:

"Finally, it is urged that the court adopted a wrong standard of damages; that in compensating plaintiffs for their loss of the 19 acres of land for which they gave their notes and deed of trust, and which, owing to the fraudulent representations of defendant, they did not get by his deed to them, the court erroneously fixed the compensation at the amount per acre for which the whole tract sold; that he should have awarded them the difference between the value of the land as it was represented and its value as it actually was at the time of the sale. There was no evidence tending to show that one part of the land was more valuable than another. It was represented as 80 acres, and the circuit court took the view most favorable to defendant under these circumstances, and estimated the land as represented to be 80 acres, and the whole price at \$600, and reached the conclu-

sion that the defendant had agreed to purchase at a price of \$7.50 per acre, and, as the deficit was 19 acres, he allowed plaintiffs in the proportion of 19 to 80, or \$142.50. In so ruling the court was not without precedent. In *Gass v. Sanger* (Tex. Civ. App.), 30 S. W. 502, it was ruled in an action to recover for land lost because of conflict of boundaries, in the absence of any proof to the contrary, the measure of recovery was held to be such a portion of the entire price as the amount lost is to the entire tract. And to the same effect is *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233. In *Logan's Adm'r. v. Bryant* (Ky.), 44 S. W. 435, the vendor represented the boundary as containing 40 acres, when in fact it only contained 17 acres, and it was ruled by the court of appeals that the purchaser was entitled to a credit on the price for the deficiency, estimated at the contract price. Now, under the evidence in this case, it is plain that plaintiffs stipulated for 80 acres, and the defendant positively represented the quantity as 80 acres, and it is clear that, in the absence of any proof to the contrary, it was favorable to the defendant to estimate the deficit at \$7.50 an acre, that being the value according to the contract price; because, though the land was neither bought nor sold professedly by the acre, the presumption is that in fixing the price regard was had on both sides to the quantity which both supposed the estate consists of. *Hill v. Buckley*, 17 Ves. 401. There is no evidence as to what the land would have been worth had it contained 80 acres, as it was represented, and we see no ground for reversal because the court adopted this measure of compensation."

*McGhee v. Bell* (Mo. 1902), 70 S. W. 493.

In the case of *Paisley v. Hatter* (Ky. 1911), 137 S. W. 250, notwithstanding that the deed recited "containing 100 acres more or less sold in gross not by the

acre", there being a deficiency of  $12\frac{1}{2}$  acres out of the 100 represented to be sold, the court allowed compensation for the  $12\frac{1}{2}$  acres and cited with approval, the rule laid down in *Boggs v. Bush*, 122 S. W. 222, cited *supra*.

We will now quote from the case of *Howes v. Axtell*, 37 N. W. 975-976, wherein the Court says:

"When parties, by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them. The instruction directs that the value of the land as it is found, considering its real quantity, is to be deducted from the value as settled by the agreement of the parties, and the difference will be plaintiff's damages. This rule is just, as it gives plaintiff compensation, and nothing more."

*Howes v. Axtell* (Iowa 1888), 37 N. W. 974.

We will now quote from the case of *Paine v. Upton*, 41 Am. Rep. 373, 374, 375, 376, wherein the Court says:

"In the absence of any finding of special facts and circumstances, the natural presumption is that in a sale of agricultural land the element of quantity enters into the transaction, and affects the consideration agreed to be paid. But in this case it is plain, that the representation of quantity was deemed material by the parties. The sale was perhaps not *technically a sale by the acre*. But the starting point of the negotiation was an inquiry by the purchaser, as to the quantity of land in the farm, and the gross sum originally asked was fixed by the sellers, by reckoning the land at \$150 an acre, not counting any surplus there might be over two hundred and twenty acres. The price finally agreed upon was also fixed upon the sup-

position that the farm contained at least two hundred and twenty acres. This is a necessary inference from the finding, that the parties acted upon the assumption that the farm contained that number of acres, and that the contract was made and executed upon this basis. It is also very material, that the misconception under which the plaintiff labored in respect to the number of acres, was induced by *the untrue*, although not *fraudulent, representation of the defendants*. \* \* \*

We are relieved from the necessity of examining the authorities elsewhere, with a view of determining whether under such circumstances the presence of these words, in an executory contract for the sale of land, is a bar to equitable relief, by the decision of this court in *Belknap v. Sealey*, 14 N. Y. 143. It was there held that the introduction of the words more or less, following the enumeration of the number of acres, was no obstacle to relief in equity upon the ground of mistake. The authorities in this State were carefully reviewed in the able opinion of Comstock, J., and it was satisfactorily shown that the cases supposed to have a bearing adverse to this view were of two classes, first, cases where the question was one of construction purely, in a court of law, and not one of mistake in a court of equity, and second, cases where relief was denied on the ground that it appeared from the words more or less, and the extrinsic circumstances, that the risk of the quantity was one of the elements of the contract. The court said, that those words, in a contract or conveyance of land, do not import a special engagement that the purchaser takes the risk of the quantity, and that while their presence may render it more difficult to prove such a mistake as will justify the interference of equity, they are not equivalent to a stipulation that the mistake, when ascertained, shall not be ground of relief. The conclusion in *Belknap v. Sealey*, is founded, we think, upon the most obvious equity. It is not a satisfactory an-

swer to the claim for relief, against a mistake in the quantity of land contracted to be sold, embraced within given boundaries, to say that the statement of the number of acres is mere matter of description. It is true that such a statement, following a description by boundaries, does not amount to a covenant that the land contains that quantity, but it is quite another question whether equity will not relieve a purchaser when both parties supposed the statement to be true, and the bargain was made upon that belief—and it turns out that the quantity is less—and the mistake materially affected the consideration. It was said in *Belknap v. Sealey*, that the primary purpose of these words is to indicate that all the land within the boundaries specified is included in the contract or deed, and is intended to pass to the purchaser. They are also intended to cover small discrepancies between the actual quantity and that stated in the contract or deed and no inference of mistake would arise from a small discrepancy merely. But where the difference is material and the mistake is confessed, or satisfactorily proved, there would seem to be no violation of principle in granting relief."

*Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371.

We will now quote from the case of *Belknap v. Sealey*, 67 Am. Dec. 129, 130, wherein the Court says:

"A deed which describes the land and states the number of acres, although with the words 'more or less', clearly imports that there is not a great deficiency or excess. If the deficiency is one-half, the instrument carries on its face a gross misrepresentation. And it is quite material to observe that such words do not import a special engagement that the purchaser takes the risk of the quantity. Their presence in a contract or deed may render it more difficult to prove such a mistake as will justify the interference of equity, but they are

not equivalent to a stipulation that the mistake, when ascertained, shall not be a ground of relief. Even if that construction were to be placed upon them, it would still hold true that the contract, viewed in that light, may be entered into under misrepresentation and error so gross that it should not be allowed to stand."

*Belknap v. Sealey*, 14 N. Y. (4 Ker.), 143, 67 Am. Dec. 120.

We will now quote from the case of *Brown v. Yoakum*, 170 S. W. 805, wherein the Court says:

"However innocent appellant may have been in his representations as to the number of acres, that would not relieve him of liability, if the vendees relied upon such representations and were induced thereby to take the land. Of course, if there had been evidence showing that appellees took the risk as to the quantity of land, they could not recover; but the mere fact that they accepted a deed without a general warranty did not prove that such risk had been taken. The evidence, on the other hand, tended to show that the vendees expected to get the full acreage paid for by them and relied on the representations of the vendor as to the acreage."

*Brown v. Yoakum* (Tex. 1914), 170 S. W. 803.

We will now quote from the case of *Sine v. Fox*, 11 S. E. 219, 220, in which the Court says:

"Taking the facts proved by all the evidence in this cause, it is very clear that the plaintiff is entitled to the relief prayed in his original bill. While, according to the decisions of this court, the sale here cannot be regarded as a sale by the acre, it is plainly a sale in gross of a specified quantity of land. Where a vendor by deed, for an entire sum, conveys a tract of land by metes

and bounds, stating therein the quantity, this on its face is a sale in gross, and not by the acre; but, as the specification of the quantity, without any qualifying words, renders the deed ambiguous as to whether it was or was not intended that the vendor would warrant that there was that quantity, the court will admit parol evidence of the circumstances surrounding the parties, and their situation at the time of the sale, and also their subsequent conduct in carrying it into execution. *Hansford v. Coal Co.*, 22 W. Va. 70; *Crislip v. Cain*, 19 W. Va. 438; *Anderson v. Synder*, 21 W. Va. 632. In *Kelly v. Riley*, 22 W. Va. 247, this court held as follows: 'Where a person has made a sale of land in gross, at a specified price, upon an unqualified statement that it contains a definite quantity, or specified number of acres, it will be held, *prima facie*, that the vendee was influenced to pay, or agree to pay, the price specified because of such statement; and, if it is afterwards established that there is a deficiency in the quantity in excess of what may be rightfully attributed to the usual inaccuracies in surveying, the vendor, in the absence of all other proof, will be presumed to have committed a fraud on the rights of the vendee by such statement of the quantity, and a court of equity will for this reason grant relief to the vendee for such deficiency.' See, to the same effect, *Depue v. Sergeant*, 21 W. Va. 326."

*Sine v. Fox*. 33 W. Va. 521, 11 S. E. 218.

We will now quote from the case of *Couse v. Boyles*, 38 Am. Dec. 517, wherein the Court says:

"The plain and sensible rule, as it appears to me, is this: when land is sold as containing so many acres, 'more or less,' if the quantity on an actual survey and estimation, either overrunning or falling short of the contents named, be small, no compensation should be recovered by either party. The word 'more or less,' must be intended

to meet such a result. But if the variance be considerable, the party sustaining the loss should be allowed for it. And this rule should prevail where it arises from mistake only, without fraud, or deception. The case of *Hill v. Buckley*, 17 Ves. 401, decided by Sir William Grant, master of the rolls, is very much in point, and settles the question in a satisfactory manner. That was a bill for a specific performance; the quantity of land was represented to be two hundred and seventeen acres and ten perches. It turned out to be about twenty-six acres less, and the party had an abatement *pro tanto*. In this case, too, there was no evidence of any intended deception; and the rule is stated to apply generally, although the land is not bought or sold professedly by the acre; the presumption being, that in fixing the price, regard was had to the quantity. \* \* \* The defendant, by his answer, distinctly declares he never would have paid the price he did, had he known the true quantity of land. The variance is too large to be passed by; taking a medium quantity between the two estimates, and it will leave a deficiency of nearly thirty acres on the purchase of one hundred and thirty-five acres. The fact that Mr. Boyles *lived a neighbor and saw* the land daily, *can have no bearing on the question*, nor can the doctrine of *caveat emptor* have any application. A purchaser relies, and has a right to rely upon the vendor for the number of acres, and may and usually does place implicit confidence in his statements."

*Couse v. Boyles* (New Jersey), 3 Green's Chanc. 212, 38 Am. Dec. 514.

We will now quote from the case of *Triplett v. Allen*, 21 Am. Rep. 321, in which the Court says:

"The court is of the opinion that under the contract of the parties and the evidence taken in

the cause, the sale was a sale per acre and not a sale in gross, and that the appellee is bound to make good the deficiency at the average value of the home tract per acre.

"But if the contract can be considered a sale in gross and not per acre, the insertion of the words 'more or less' in the deed does not affect the case. For it is well settled by repeated decisions of this court, that the employment of such words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reasonably attributed to small errors from variation of instruments or otherwise; unless indeed, there be evidence to show that a contract of hazard was intended. In the absence of such evidence, it is to be presumed that the parties contract with reference to quantity. It is an important element in every agreement, and *prima facie* must be intended to influence the price.

"Ten acres in a tract of one hundred and sixty-six acres, especially when worth at least \$50 per acre, is not one of these 'small deficiencies' to be covered by the phrase 'more or less'; and the vendor must be held liable, and the vendee compensated for such deficiency."

*Triplett v. Allen*, 21 Am. Rep. 320, 26 Gratt. 321.

We will now quote from the case of *Smith v. Ely*, 76 Am. Dec. 109, 110, wherein the Court says:

"It appears to be well settled that in the sale of land where there has been misrepresentation as to the quantity, though innocently made, and the parties were under a mistake as to the quantity, and the deficiency is so great as to have been material in the object of the purchase, affecting the essence of the contract, equity will grant relief: 1 Sugden on Vendors, c. 7, sec. 3; *Mitchell v. Zimmerman*, 4 Tex. 75 (51 Am. Dec. 717);

4 Kent's Com. 457; 1 Story's Eq. Jur., sec. 141. And this, says Judge Story, would be so, although the land was described as so many acres, 'more or less.' It would certainly be so where the land is sold by the acre, and the statement of the quantity of acres in the deed is not mere matter of description, but is of the essence of the contract.

"The plaintiff alleges that he bought and paid for the land by the acre; that there was misrepresentation and a mistake as to the quantity of land conveyed; and that it fell short one hundred and fifteen acres of the quantity the tract was supposed to contain and the deed purported to convey. A deficiency so great in a sale by the acre of a tract of five hundred acres can scarcely be supposed to have been within the risk which the parties meant to incur, or to have been intended to be embraced by the words 'more or less,' employed in the deed. There can be little doubt that the allegations of the petition show a cause of action; and the question is, whether it was barred by the statute of limitations at the time of bringing the suit."

*Smith v. Ely*, 24 Tex. 345, 76 Am. Dec. 109.

We will now quote from the case of *Hays v. Hays*,  
11 L. R. A. 377-378, in which the Court says:

"The difficulty arises in determining whether the sale was intended to be in gross or by the acre. If in gross, the mention of the quantity of acres, after another and certain description, whether by metes and bounds, or other known specifications, is not a covenant or agreement as to the quantity to be conveyed. In such cases the statement of acreage is regarded as mere matter of description and not of contract. But the terms 'by estimation,' 'more or less,' or other expressions of similar import, added to a statement of quantity, can only be considered as covering inconsiderable or small differences, one way or the

other, and do not, in themselves, determine the character of the sale. Even where the sale has been in gross, and not by the acre, if it appear that the estimated number of acres was in fact the controlling inducement, and that the price, though a gross sum, was based upon the supposed area and measured by it, equity will interfere to grant relief and rescind the contract on the ground of gross mistake. 2 Warvelle, Vend., pp. 838, 839.

"Upon a satisfactory showing, equity will interfere to vacate a contract and decree a reconveyance, or to correct the conveyance or award compensation.

"A purchaser of land has a right to rely upon the representations of the vendor relative to the extent and boundaries of his land, and is not under any obligation to examine the plats and consult the records. The law presumes that the owner knows his own property and that he truly represents it; and if the purchaser, trusting to the owner's representations, is misled thereby, to his injury, an action will lie if the representation be false. If the vendor fraudulently represents the number of acres to be greater than they are, and thereby induces the vendee to give more for the tract than he otherwise would, the vendee is entitled to an abatement or to a compensation for the deficiency by way of damages. 2 Warvelle, Vend., p. 974.

"Mr. Sugden, in his valuable work on Vendors, vol. I, p. 489, in speaking of the question now under consideration, says: '1. If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey.

"'2. The rule is the same though the land is neither bought nor sold professedly by the acre. The general rule, therefore, is that where a misrepresentation is made as to the quantity though

innocently, the right of the purchaser is to have what the vendor can give, with an abatement for so much as the quantity falls short.' See also *Tarbell v. Bowman*, 103 Mass. 341; *Solinger v. Jewett*, 25 Ind. 479; *Tyler v. Anderson*, 106 Ind. 185, 3 West. Rep. 661.

"In the case of *Solinger v. Jewett*, *supra*, the land was purchased at the agreed price of \$22 per acre. The tract described as containing 121 acres more or less contained 84.31 acres only. It was held by this court that the difference between the estimated and actual quantity of the land amounted to a gross mistake, and that the purchaser was, upon that ground, entitled to recover from the vendor by way of damages for the difference between the estimated quantity and the actual quantity in the tract sold and conveyed.

"In the case before us the land was sold at \$100 per acre, and was estimated to contain 28.40 acres, when in fact it contained 23.40 acres only. It will thus be seen that the actual quantity of land in the tract sold and conveyed was nearly one-fifth short of its estimated quantity, making a difference in value of \$500. This, in our opinion, was such a mistake as entitled the appellee to relief."

*Hays v. Hays* (Ind. 1890), 11 L. R. A. 376.

We will now quote from the case of *Hall v. Ely*, 76 S. W. 850, wherein the Court says:

"It is further apparent that, though the consideration for the land is stated in gross in the deed as \$3,500, the sale was understood by the parties as one by the acre; but, whether this was true or not, in order to effect a sale of the land to the appellant, it is evident that it was necessary for appellant and his agent to convince him that the land contained as much as 185 acres, in which they seem to have succeeded. \* \* \* We

think it evident that it was never intended or contemplated by the parties that such a loss in quantity would occur as is shown to have resulted in this case, and, moreover, this sale in gross was in reality understood by the parties thereto to be a sale by the acre, as shown by their conduct, and the circumstances surrounding the entire transaction. We are of the opinion, therefore, that this is one of the cases in which equitable relief should be allowed because the deficit is unreasonable and excessive. \* \* \* The contract price should have been abated at the ratable price per acre for the difference between 158 acres and 74 poles, the net amount of land appellant received the title to, and was put in possession of, and the 185 acres which appellee represented to appellant he was selling him."

*Hall v. Ely* (Ky. 1903), 76 S. W. 848.

We will now quote from the case of *Lenoch v. Yoss*, 157 Iowa, 314, wherein the Court says:

"Where the parties agree upon the price per acre, if there is found to be a material shortage, the damages sustained will ordinarily be the price per acre agreed upon multiplied by the number of acres short. This measure of damages is right, because of the solemn agreement of the parties that the land is worth the amount per acre named."

*Lenoch v. Yoss*, 157 Iowa, 314.

We will now quote from the case of *Epes v. Saunders et al.*, 109 Va. 99, in which the Court says:

"Where persons enter into an agreement for the payment of a gross sum for a tract of land, upon an estimation of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre and not in gross, unless the contract plainly

indicates that it is a sale in gross, and this presumption can only be overcome by clear and cogent proof."

*Epes v. Saunders et al.*, 109 Va., 99.

We will now quote from the case of *Harrison v. Talbot*, 2 Dana, 266 (Ky.), wherein the Court says:

"Sales in gross may be subdivided into various subordinate classifications: First—Sales strictly and essentially by the tract, without reference in the negotiation or in the consideration to any estimated or designated quantity of acres. Second—Sales of the like kind, in which though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description and under such circumstances or in such manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how-much-soever it might exceed or fall short of that which was mentioned in the contract. Third—Sales in which it is evident from extraneous circumstances of locality, value, price, time and the conduct and conversations of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency. Fourth—Sales which, though technically deemed and denominated sales in gross, are, in fact, sales by the acre, and so understood by the parties.

"Contracts belonging to either of the two first mentioned classes, whether executed or executory, should not be modified by the chancellor when there has been no fraud. Such was the contract in the case of *Brown v. Parish*, lately decided by this court.—Ante. 6.

"But in sales of either of the latter kinds, an unreasonable surplus, or deficit, may entitle the

injured party to equitable relief, unless he has by his conduct waived or forfeited his equity.

"Now the just application of the foregoing principles is not deemed difficult in this case. This belongs, we have no doubt to the third classification. And even if, at the time of the contract a deed, instead of a covenant, had been executed we should be strongly inclined to the opinion that Harrison would have been equitably entitled to some reclamation for an unexpected and unreasonable surplus. The date of the contract, the value of the land and its locality, would altogether tend strongly to the inference that as there is no proof that the parties contemplated more than an ordinary variation from the estimated quantity, the utmost range of the contingency which they intended that the term of their written agreement should embrace, would not include so large a surplus or deficiency as ninety acres."

*Harrison v. Talbot*, 2 Dana, 266 (Ky.)

We will now quote from the case of *Wardell v. Birdsong*, 115 Va. 294, wherein the Court says:

"It would seem to us shocking to the conscience of a court of equity to hold that a purchaser of a parcel of land sold and conveyed to him as 200 acres, more or less, when in fact the acreage is but 94½, should be required to keep and pay the purchase money for the land, although the sellers of the land, as well as the buyer, believed there were in the tract conveyed about 200 acres, and although the conveyance also contains the clause 'and it is understood this land is sold by the lump and not by the acre.' \* \* \*

"Contracts of hazard, such as we are here considering, have not been discountenanced by the courts when they have been clearly established and are fair and reasonable, but courts of equity do not regard them with favor, the presumption being against them, which presumption is to be

overcome, if at all and effectually, by clear and cogent proof; and where the parties contract for the payment of a gross sum for a tract or parcel of land, upon an estimate of a given quantity, the presumption is that the quantity influences the price to be paid and that the agreement is not one of hazard. *Blessing's Admr. v. Beaty*, 1 Rob. (40 Va.) 305, in which case the court held that the appellant was entitled to compensation for the deficiency of  $34\frac{1}{2}$  acres in a tract of 503 acres, on the ground of mutual mistake."

*Wardell v. Birdsong*, 115 Va. 294.

We will now quote from the case of *Boschen v. Jurgens*, 92 Va. Rep. 759, in which the Court says:

"These authorities not only show that equity will take jurisdiction of this class of cases, upon the ground of mistake, but that 'every sale of real estate, where the quantity is referred to in the contract, and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale per acre; that, while contracts of hazard are not invalid, courts of equity do not regard them with favor. The presumption is against them, and, while such presumption may be repelled, it can only be effectually done by clear and cogent proof; that the burden of proof is always upon the party asserting a contract of hazard, for the presumption always being in favor of a sale per acre, a sale in gross, or contract of hazard, must be clearly established by the facts; that where the parties contract for the payment of a gross sum for a tract or parcel of land, upon the estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard; that whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the

terms of the contract and all the facts and circumstances connected with it. But in interpreting such contracts the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre wherever it does not clearly appear that the land was sold by the tract and not by the acre."

*Boschen v. Jurgens*, 92 Va. 756.

We will now quote from the case of *Hill v. Buckley*, 17 Ves. 394, wherein the Court says:

"Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give; with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price, regard was had on both sides, to the quantity which both suppose the estate to consist of."

*Hill v. Buckley*, 17 Ves. 394.

The proposition of law in respect to sales in gross and sales by the acre, and as to the meaning of the words "more or less", are also discussed in the following cases, and plaintiff's position is sustained by these authorities, which we herein numerate, but do not quote from, viz.:

*Hallam v. Todhunter*, 24 Iowa 167;  
*Parker v. Walker*, 12 Mich. Law, 138 (S. C.);  
*Walling v. Kinnard*, 60 Am. Dec. 216;  
*Strauss v. Norris*, 79 Atl. 611;  
*Libby v. Dickey*, 27 Atl. 253;  
*Winton v. McGraw*, 54 S. E. 506;

- Perkins Manufacturing Co. v. Williams*, 25 S. E. 556;  
*Bogg's Exs. v. Harper's Admrs.*, 31 S. E. 943;  
*Phifer v. Steenburg*, 64 So. 265;  
*Moffet v. Schaar*, 131 Pac. 589;  
*Moore v. Hazelwood*, 4 S. W. 215;  
*Yaryombeck v. Grier*, 32 S. W. 236;  
*Hall v. McCammon*, 37 S. W. 1026;  
*Accord v. Mitchell*, 149 N. W. 839;  
*Mills v. Kampfe*, 202 N. Y. 46;  
*West v. Carter*, 103 Pac. 21;  
*Solinger v. Jewett*, 25 Ind. 479;  
*M'Coun v. Delaney*, 3 Bibb. 46 (Ky.);  
*Young v. Craig*, 2 Bibb. 270 (Ky.);  
*Crane v. Prather*, 4 J. J. Marsh 75 (Ky.);  
*Hutchings v. Moore*, 4 Mett. 101 (Ky.);  
*Pringle v. Samuel*, 1 Litt. 43 (Ky.);  
*Skinner v. Walker*, 98 Ky. 729;  
*Elder v. Lewis*, 2 Ky. Law Rep. 229;  
*Shubert v. Chambers*, 4 Ky. Law Rep. 266;  
*Harelmeir v. Sanders*, 5 Ky. Law Rep. 865;  
*Haslip v. Austill*, 4 Ky. Law Rep. 982;  
*Phelps v. Wilson*, 16 La. 185;  
*Campbell's Ex. v. Wilmore*, 6 J. J. Marsh 209 (Ky.);  
*Mendenhall v. Steckel*, 47 Md. 453;  
*Marbury v. Stonestreet*, 1 Md. 152;  
*Thwing v. Davison*, 33 Minn. 186;  
*Leigh v. Cramp*, 36 N. C. 299;  
*Wilcoxson v. Calloway*, 67 N. C. 163;  
*Joplin v. Nunnally*, 134 Pac. 1177;  
*English v. Arbuckle*, 25 N. E. 142;  
*Berry's Exx. v. Fishburne*, 51 S. E. 827;  
*Collins v. Stodghill*, 79 S. W. 185;  
*Paisley v. Hatter*, 137 S. W. 250;  
*Moreland v. Henry*, 161 S. W. 1105;  
*Earl v. Bryan*, 62 N. C. 278;  
*Douglass v. Plotkin*, 13 Ohio Cir. Ct. Rep. 461;  
*Procter v. Bell*, 9 Ohio Dec. 853;  
*Groves v. Brinkerhoff*, 4 Hun. 305 (N. Y.);  
*McIntyre v. Harrington*, 43 Mscl. 94 (N. Y.);

*Wilson v. Randall*, 67 N. Y. 338;  
*Franco-Texan Land Co. v. Simpson*, 1 Tex. Civ.  
 App. 600;  
*Walsh v. Hale*, 25 Grat. 313 (Va.);  
*Camp v. Norfleets Adms.*, 83 Va. 380;  
*Grayson v. Buchanan*, 88 Va. 251;  
*Holback v. Kilgores*, 26 Gratt. 442 (Va.);  
*Blessings Admrs. v. Beatty*, 1 Rob. 287 (Va.);  
*Norfolk Trust Co. v. Foster*, 78 Va. 413;  
*Watson v. Hoy*, 28 Gratt. 698 (Va.);  
*Darling v. Osborne*, 51 Vt. 148.

**ARGUMENT ON POINT THAT DEFENDANTS ARE  
 LIABLE FOR ALL INSTRUMENTALITIES USED  
 BY AGENTS IN EFFECTING SALE.**

The plaintiff, in this action, contends that all of the representations which were made to her in respect to the property sold to her by the three Scheiber brothers, were such representations as she had a right to rely upon. In respect to the real property they pointed out certain land-marks, fences and trees, etc., and in that manner roughly indicated indefinite boundary lines, and then and there stated to plaintiff that the entire land which was included within the rough boundary lines thus indefinitely pointed out, was all clear level land, and told her that the expanse which she looked upon from where she stood, was the land which they wanted to sell her. Plaintiff, even though she had been dealing at arm's length, and upon an equal footing with the defendants, had a right to rely upon that representation. The defendants' agents represented to her that the land in question was all clear and level and the best quality of alfalfa land. Plaintiff had a right to rely upon that statement, even though she were

dealing at arm's length with the defendants. Defendants' agents represented to plaintiff that said land, being all first-class alfalfa land, would produce five and six cuttings a year of alfalfa and that the land would produce eight to ten tons of alfalfa per acre each season. That, that was what was being produced by the portion then planted to alfalfa and that the balance would do likewise. That also is a statement and representation which plaintiff had a right to rely upon and would have had a right to rely upon even though she had been dealing at arm's length with the defendants. In no way does the doctrine of *caveat emptor* apply in this case, and the plaintiff was not bound to investigate the property in any special manner. All of the representations made to her by defendants or their agents in respect to the quantity or quality of the producing power, or character of the land, were such as could be relied upon by a person dealing at arm's length with the defendants and upon an equal footing. But, in this case, the purchaser was not dealing at arm's length with the vendors, and she was not upon an equal footing with them. She knew nothing whatever of land of any character, or land values of any character, and was totally inexperienced in reference to the property which she was purchasing. Neither did she know anything about horses or cattle or dairying or dairy farm implements. The purchase which she made of the property of the three Scheiber brothers, was made purely by reason of the counsel and advice of Dr. F. I. Ramos, to whom she was at

that time engaged to be married. The said F. I. Ramos had her entire trust and confidence and it was in reliance upon his business judgment and integrity that she purchased this property of defendants. She bought the property simply because he told her to buy it. Defendants' agents, in order to induce the said F. I. Ramos to counsel and advise plaintiff to purchase the said property, gave to the said F. I. Ramos the sum of \$1,500 to put into his own private pocket for himself; and for such consideration, the said F. I. Ramos did so advise plaintiff, and plaintiff, in turn acted upon his advice. In their answer to the complaint, defendants deny all knowledge of any such transaction had, or existing between their said agents and the said F. I. Ramos; and deny that they ever authorized the said agents to enter into any such an agreement with the said F. I. Ramos; and defendants now seek to be excused from any liability growing out of that transaction, upon the ground that they did not participate in it, and were in nowise a party to it. The authorities hereinafter cited will be devoted to the proposition that they are liable, even though it is true that they did not authorize the transaction. In commencing this argument it might be well in the first instance to quote Section 2338 of the Civil Code of the State of California, which reads as follows:

“Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction

of such business, and for his wilful omission to fulfill the obligations of the principal."

Under this section in the cyclopedic codes, many California cases appear all to the point that a principal is liable to third persons for all frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances, and misfeasances, and omissions of duty of his agent in the course of his employment. Such was the holding in the case of *Bank of California v. Western Union Telegraph Co.*, 52 Cal. 280. This is an extremely important case, and the discussion in the opinion throws a great deal of light on the present situation.

A principal, having accepted the benefits of a fraudulent contract made by his agent, is equally bound with his agent for any fraudulent representations which induced it. *Freeman v. Kieffer*, 101 Cal. 254.

F. I. Ramos occupied a fiduciary relationship with the plaintiff in this action and this fact was well known to defendants' agents. Their giving him \$1,500 for himself out of their commission, while at that time knowing that he occupied this position of trust and confidence with the plaintiff, was a wrongful act absolutely vitiating the contract. They knew that she would not buy anything without his approval, and the giving to him of this money was an absolutely immoral and illegal way of securing her agreement to purchase. The defendants are liable for the acts and representations of their agents in this respect, and they are also liable for the acts and representations

of their sub-agents. The cases which we will now quote are sufficient, we believe, to back up everything that we have herein just stated.

We will now quote from the case of *Neuman v. Friedman*, 136 S. W. 251, wherein the Court says:

"So jealous is the law with respect to the relation of trust which obtains between principal and agent that it condemns as fraudulent and affords the right of relief from, or the cancellation of all contracts, conveyances, etc., which have been effected between the parties through an agent in the employ of both, provided the relief or cancellation sought is by one who is ignorant of the double agency, and he is not estopped from complaining on the theory of condonation."

*Neuman v. Friedman* (Mo. 1911), 136 S. W. 251.

We will now quote from the case of *Harper v. Fidler*, 105 Mo. App. 680, wherein the Court says:

"The antagonism which exists between the opposite parties to a bargain is generally recognized by law. Each acts and has a right to act with a view to his own interests and they deal at arm's length. Accordingly if one acts by an agent, that agent should be not nominally, but really in place of the principal with his self-interest undisturbed by calculations as to the interests of the opposing party. This, as well as the exercise of the best skill and judgment of his agent as to the contingencies of the bargain, the principal has the right to demand. Accordingly, a contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law, that the contract is held void. Such bargains are constructively fraudulent."

*Harper v. Fidler*, 105 Mo. App. 680.

We will now quote from the case of *Alger v. Anderson*, 78 Fed. 729, wherein the Court says:

"It is now fully established and no longer open to question, that the principal is bound by the fraud of his agents in making a sale, in relation to that sale, as much so as the principal would be, if acting in person; and this, notwithstanding the fraud was perpetrated without the knowledge or approval, and against the consent of the principal.

\* \* \* It is well settled, consequently, that the fact of the agent having been bribed or tempted to betray his principal is sufficient to entitle the principal to repudiate the transaction, and it is not necessary as a basis for relief, for such principal to show the actual effect of the bribe or gift upon the agent. The ground on which the rule rests is much deeper and broader than a mere question of evidence and takes into full account human nature. The agent is not allowed, by gift, commission, or other form of compensation or consideration, to assume an attitude in conflict with the very best interests of his principal. It is a relation which, on grounds of public policy, demands the utmost loyalty to the principal at all times."

*Alger v. Anderson*, 78 Fed. 729.

We will now quote from the case of *Yeoman v. Lasley*, 40 Ohio St. 190, wherein the Court says:

"A vendee cannot be his own vendor. So vital is this principle that the same person cannot be in one transaction, the agent of both vendor and vendee, unless both know the fact, and consent thereto. If a vendor secretly bribe the agent of the vendee, and induce him to deceive his principal in a matter material to the sale, the vendee's right, on discovery of the fraud, to a rescission, is undoubted."

*Yeoman v. Lasley*, 40 Ohio St. 190.

We will now quote from the case of *Commonwealth S. S. Co. v. American Shipbuilding Co.*, 197 Fed. 780, wherein the Court says:

"It seems plain that when one party is endeavoring to warp the judgment and integrity of the agent of another, and endeavoring to induce that party to cheat his principal, all of the dictates of equity and justice make it the plain duty of a court of equity to set aside the entire transaction.

"Such action on the part of a court has been suggested by counsel for the defendant in their able brief, as an altruistic enthusiasm for purity and righteousness in commercial transactions, be they large or small, must conform with the fixed standards of honesty. It would indeed be a travesty upon justice, if a court of equity, having placed before it all of the elements which constitute fraud and bribery, would refuse to render relief and say to the parties that an action for damages to recover the amount of the bribe, was the proper remedy. If such were the rule of conduct of the courts, dishonest parties might bribe agents at will, and, if they were discovered in their bribery respond to damages to the extent of their bribe, and, if not discovered, enjoy the full amount and extent of their illegal action. The courts cannot recognize such a doctrine and will not stop to inquire whether the contract was fair or otherwise, but will set aside the entire transaction as fraudulent and inequitable. With commercial advancement and the evolution of modern business, fraud has become too prevalent and too readily reconciled as an incident to financial achievement. Fraud should be prevented by being made as far as possible impossible of perpetration, and the party who enters into a fraudulent transaction should do so at his peril. It is no duty of a court to weigh the equities of joint test-feasens, or of bribe givers and bribe takers. A court should have little respect for itself if it

endeavored to adjust the rights between the conspiring parties who endeavored to perpetrate a fraud."

*Commonwealth S. S. Co. v. American Ship-building Co.*, 197 Fed. 780.

We will now quote from the case of *Stelting v. Bank of Sparta*, 117 N. W. 798, wherein the Court says:

"Where a broker employed to procure a purchaser of land, intentionally or otherwise, pointed out the wrong land to an intended purchaser and the purchase was made in the belief that the land purchased was shown, the consideration paid may be recovered, though the vendor did not know when it was paid, that the wrong land had been shown. \* \* \* One employed to procure a purchaser for real estate, has the power to do those things ordinarily done in such cases to procure a purchaser for the property."

*Stelting v. Bank of Sparta* (Wis., 1908), 117 N. W. 798.

We will now quote from the case of *Farris v. Gilder*, 115 S. W. 645, in which the Court says:

"The land having been listed by Gilder with Eubanks for sale, Gilder would be responsible for any false representations made bringing about the sale, and the principal would not be permitted to take the benefit of his agents' act to the injury of an innocent third party."

*Farris v. Gilder* (Tex., 1909), 115 S. W. 645.

We will now quote from the case of *Copeland v. Tweedle*, 122 Pac. 302, wherein the Court says:

"Fraudulent misrepresentations by an agent as to the amount of timber on land placed with him

for sale, is within scope of his agency and principal bound thereby."

*Copeland v. Tweedle* (Ore., 1912), 122 Pac. 302.

In the case of *Hussey v. Michael*, 138 Pac. 596, fraudulent statements were made to agents, who in turn innocently repeated these statements to sub-agents, who in their turn repeated these statements to plaintiff and thereby sold the land. The Court held principal to be liable.

We will now quote from the case of *Elwell v. Chamberlain*, 31 N. Y. 611, wherein the Court says:

"They (the principals) cannot be permitted to enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud on the terms of making complete restitution. But so long as he retains the benefits of the dealing he cannot claim immunity on the ground that the fraud was committed by the agent and not by himself."

*Elwell v. Chamberlain*, 31 N. Y. 611.

We will now quote from the case of *Wright v. Calhoun*, 19 Tex. 412, wherein the Court says:

"It would indeed be a monstrous doctrine to hold that a principal may speculate upon and enjoy the fruits and the frauds of his authorized agent, and incur no responsibility to the injured parties—such a doctrine can have no sanction, either in morals or in law. Nothing can be more clear, than that the principal in this case cannot

avail himself of the fraudulent contract of his agent. The purchase being fraudulent, on the part of the agent, Rogers, cannot enure to the benefit of the principal, Calhoun, whether he was, or was not *particeps fraudis*."

*Wright v. Calhoun*, 19 Tex. 412.

We will now quote from the case of *L. Mayer & Co. v. McClure*, 36 Miss. 389, wherein the Court says:

"The principal is liable to third persons in a civil suit for the frauds and misfeasances, or neglect of duty of his agent, and all those whom the agent employs about his business, though without his knowledge or consent the third persons therefore who treat with a sub-agent as with one having authority, have no right, as against the principal, to set up that the agent is without authority to act for the benefit of the principal, and moreover, the principal may ratify the act of such sub-agent and thus secure the benefit of an act done by him."

*L. Mayer & Co. v. McClure*, 36 Miss. 389.

In the case of *Renwick v. Bancroft et al.*, 56 Iowa 527, the Court held that where an agent was authorized by the owners to sell certain land, exercising his own discretion as to price and terms after an examination of the land, it was held that he might properly employ a sub-agent to find a purchaser, and that the sale made by such sub-agent, was binding upon the owners.

We will now quote from the case of *Gum v. Equitable Trust Co. et al.*, 1 McCrary's Rep. 51 (U. S. Cr. Ct.), wherein the Court says:

"It is not necessary that a sub-agent should be

known to his principal, or in any way recognized by his principal in order to bind the latter.  
 \* \* \* Authority is sometimes implied from the very nature of the duties and powers committed to a general agent to employ sub-agents, and when this is the case, the principal is bound by the acts of the sub-agent, although the latter may never be known or recognized by the principal."

*Gum v. Equitable Trust Co. et al.*, 1 McCrary's Rep. 51 (U. S. Cr. Ct.)

In the case of *McKinnon v. Vollmar*, 6 L. R. A. 121, the Court held that showing land to a prospective customer is a mere ministerial act which an agent, for the sale thereof, may appoint another to do.

We will now quote from the case of *Nelson v. Title Trust Co.*, 100 Pac. 730, wherein the Court says:

"The owner is the beneficiary of the sale. The salesmen are his agents, and under the ordinary rule of agency the owner is responsible for the representations his agent made in the line of his employment. It is true that the agency in this case is one degree removed; Erickson, who sold the lots to appellant, having been employed by Arnold & Nachant, the firm who had the contract with the owner to sell the addition, Arnold & Nachant agreeing to divide with Erickson their commission on lots sold by him. But this was a mere detail as to the manner of sale by Arnold & Nachant. The owner was still equally the beneficiary of the transaction, and it would tend to encourage fraudulent representations if such owner were allowed to escape responsibility through the subterfuge of having the sale made by a sub-agent. He must not be allowed to disclaim responsibility and, at the same time, receive the benefit of the fraudulent transaction."

*Nelson v. Title Trust Co.* (Wash., 1909), 100 Pac. 730.

We will now quote from the case of *Phoenix Insurance Co. v. Willis*, 8 Am. St. Rep. 569, wherein the Court says:

"It is well settled that the knowledge of the agent will be imputed to the principal in matters where the agent is acting in the scope of his authority, and that the principal cannot avail himself of the fruits of his agent's fraud on account of his ignorance of such fraudulent conduct."

*Phoenix Ins. Co. v. Willis* (70 Tex. 12), 8 Am. St. Rep. 569.

We will now quote from the case of *Locke v. Stearns*, 42 Mass. 560, in which the Court says:

"The rule is laid down generally in a recent compilation of good authority, that though a principal in general, is not liable criminally for the act of his agent, yet, he is civilly liable for the neglect, fraud, deceit or other wrongful act of his agent in the course of his employment, though in fact the principal did not authorize the practice of such acts, but the wrongful or unlawful acts must be committed in the course of his agent's employment."

*Locke v. Stearns*, 42 Mass. 560.

We will now quote from the case of *Jewett v. Carter*, 132 Mass. 335, wherein the Court says:

"If the agent, acting within the scope of his authority, represented that he knew facts which were not true but which he did not know to be false, it is immaterial whether or not the plaintiffs knew that he was to make the representations, or expressly authorized them. Such representations

are fraudulent in the agent, and the principal is bound by them."

*Jewett v. Carter*, 132 Mass. 335.

We will now quote from the case of *Tagg v. Tennessee National Bank*, 56 Tenn. 479, wherein the Court says:

"A fraudulent representation or concealment of material facts by the agent when engaged in the principal's business, will charge the principal constructively through the agent."

*Tagg v. Tennessee National Bank*, 56 Tenn. 479.

We will now quote from the case of *Eilenberger v. Protective Mutual Fire Insurance Co.*, 89 Pa. St. 464, wherein the Court says:

"The fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by an insurance company, will not enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract."

*Eilenberger v. Protective Mutual Fire Ins. Co.*, 89 Pa. St. 464.

We will now quote from Story's Agency, Section 452:

"The principal is held liable to third persons, in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances and omissions of duty in his agent, in the course of his employment, although the principal did not authorize, justify, or participate in, or indeed know of, such misconduct, or even if he forbade them or disapproved of them.

"In every such case the principal holds out his agent as competent and to be trusted; and thereby in effect he warrants his fidelity and good conduct in all matters of his agency."

We will now quote from the case of *Wolfe v. Pugh*, 101 Ind. 293, 304, wherein the Court says:

"When a principal authorizes an agent to do a certain thing, he is answerable for and bound by the acts and representations of the agent in accomplishing that end, even though the agent is guilty of fraud in bringing about the result. Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are in the line of accomplishing the object of the agency. Having put the agent in a position where he may perpetrate a fraud upon innocent third parties, the principal will not be allowed, as against such third parties, to retain the fruits of the fraud and defeat a claim of reparation by saying that he justifies the end, but not the means used by the agent. Conceding that the principal is innocent of any active fraud, yet, when a case arises that he or an innocent third party must suffer by the fraud of the agent, the principal, who conferred authority upon the agent, must suffer the loss rather than the innocent third party. This the principal may generally avoid by submitting to a rescision of the contract, and restoring what he may have received as the fruit of the agent's bad faith. To thus bind the principal by the fraud of the agent is not to bind him beyond the scope of the agency. In such a case, the agent does not exceed his authority, but perpetrates a fraud in the exercise of his authority to accomplish the object of the agency, and in such case the principal is liable for the fraud, although he may not have directed it nor had knowledge of it. The

fraud of the agent becomes the fraud of the principal as to third parties."

*Wolfe v. Pugh*, 101 Ind. 293, 304.

We will now quote from the case of *Althorf v. Wolfe*, 22 N. Y. 365, which was an action brought by the administrator of one killed by ice thrown from the roof of defendant's house. Fagan, defendant's servant, had been directed to remove the snow from the roof, and without authority from defendant engaged one Cashan to assist. Counsel for defendant requested the Court to charge the jury that if they found that the relation of master and servant did not exist between the defendant and Cashan, and that Cashan actually threw the snow and ice that struck the deceased and caused his death, the defendant was not responsible. The charge was refused, and the Court of Appeals sustained the court below in its refusal. (22 N. Y. 364.) In the same case, Denio, J., said:

"The defendant intrusted the removal of the snow and ice from the roof to one of his servants. I admit that this servant ought not to have taken his friend on the premises, but that he should have done the work himself, and moreover that it was a piece of misconduct to admit Cashan upon the roof; and if Fagan did not know Cashan to be a discreet and prudent man, it was an act of negligence. But the defendant, by giving him charge of the business, and permitting him to have access to the roof, enabled him to take others there. The defendant does not and cannot deny that he is responsible for the negligent and wrongful acts of Fagan. If it had been certain that it was that person, and not Cashan, who threw the piece of

ice which killed the deceased the defendant would clearly have been responsible. Instead of accomplishing the mischief in that manner, Fagan, *by a negligent and improper act*, enabled Cashan to do it. If we keep in mind that the defendant is responsible for the acts of Fagan, and that Fagan took his comrade on the roof, and thus enabled the latter to do the mischief, it is difficult to discover any principle which will shield the defendant from responsibility. It is not necessary to consider Cashan as the defendant's servant. He was rather the instrument by which Fagan, for whose conduct the defendant was undeniably responsible, did the wrong."

*Althorf v. Wolfe*, 22 N. Y. 365.

The case of the *Bank of California v. Western Union Telegraph Co.*, 52 Cal. at page 291, quotes very extensively from the above cited case of *Althorf v. Wolfe*, and the California case also quotes the following from the opinion in the New York case:

"There is a class of cases where the master is not responsible for the acts of his servant, on the ground that he was not at the time acting in the business of his master, as where he commits a wilful trespass. (1 East. 106; 2 Comst. 479.) But in this case Fagan was in the service of the defendant, even in procuring Cashan to go upon the house. He was not, it is true, serving him properly, or according to his duty; but it was the master's business, and not his own, that he was engaged in."

*Bank of California v. Western Union Tel. Co.*,  
52 Cal. 291.

The case of the *Otis Elevator Co. v. First National Bank*, 163 Cal. at page 31, says:

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business. (Story on Agency, sec. 452; Shearman & Redfield on Negligence, sec. 65; Civ. Code, sec. 2338.) After declaring this to be the rule Story says: 'In all such cases the rule applies *respondeat superior*; and it is founded upon public policy and convenience for in no other way could there be any safety to third parties in dealings either directly with the principal or indirectly through the instrumentality of agents. In every such case the principal holds out the agent as competent and fitted to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.'

*Otis Elevator Co. v. First Natl. Bank*, 163 Cal. 31.

F. I. Ramos held a position of trust and confidence with plaintiff, and this fact was known to defendants' agents, and their giving him money out of their commission, which was contingent upon the sale of this land to the plaintiff, was a wrongful act for which the owners are liable, notwithstanding the fact that they had no knowledge of the transaction.

We will now quote from the case of *Connecticut Mut. Life Ins. Co. v. Carson*, wherein the Court says:

"The law is well settled that where the owner of land pays a real estate agent or broker a commission to sell it, and in doing so the agent makes false representations concerning the land which induce a customer to buy, such owner, although unaware of the fraud, when he accepts the bene-

fits of the transaction, is also laden with the burdens thereof, and in such case the fraud of the agent or broker is chargeable to the owner. *The cases go to the extent of holding an owner for the representations of an unauthorized agent if the owner adopts the trade made and accepts the benefits that flow from the bargain.* The representation complained of, however, must be such as would naturally fall within the apparent scope of the agent's employment. In our case, the false representations were made as to the character and formation of the land, its nearness to a railroad agency, that it did not overflow, and that it had natural drainage. These things might naturally be expected to induce a sale of the property. We find in the case of *Millard v. Smith*, 119 Mo. App. loc. cit. 711, 95 S. W. 942, the following quotation which the court in that case said is unquestionably the law:

"There is no doubt of the general proposition that, if an agent is employed to effect the sale of lands for his principal, and he does so by means of false representations in respect to the land conveyed, even without the authority or knowledge of his principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized the same.'

"In *Williamson v. Tyson*, 105 Ala. 644, 653, 17 South. 336, 339, this language appears:

"The general rule of law that one who deals with an agent is bound to know the extent of his authority is fully recognized, and one absolutely necessary to the protection of a principal in all actions brought against him founded upon contracts made by an agent. The doctrine is equally as well established, and rests upon sound principles, that a principal who seeks to avail himself of a contract, made by another for him, whether by an appointed or a self-constituted agent, is bound by the representations made and methods employed by the agent to effect the contract.' Citing many cases.

"There can be no reasonable distinction drawn between a tort brought on through fraud and one brought on through negligence. The principal or master is held where the transaction was concerning his business and from the doing of which he derives benefit. This rule works no hardship on a landowner, because, in the first place, he can select who is to sell his property, and again, before accepting the negotiations of the agent he can inquire of the purchaser as to what representations, if any, the agent made. The reason for such rule is that where one of two innocent persons must suffer, it is nothing but right that the burden be saddled on the one who put it in the power of the wrongdoer to perpetrate the wrong. This entire question is thoroughly discussed in 2 Mechem on Agency (2d Ed.), sections 1984 to 1996, inclusive, preceded by the title, 'Liability for Fraudulent Acts and Representations' (of an agent), where the footnotes to many cases from the different states and England are cited as upholding the rule announced here. We, therefore, hold that the plaintiff is chargeable with the fraud worked on defendant by W. Ross McKnight."

*Connecticut Mut. Life Ins. Co. v. Carson*  
(Mo., 1915), 172 S. W. 69.

In the case of *Jones v. National etc. Assn.*, 94 Pa. St. 215, the Court says:

"The contention on the part of the association plaintiff is, that the secretary had no authority to make the representations by which said Jones was induced to sign the note as surety; that it was, therefore, a fraud and not binding on said association; that is, the latter could repudiate the fraud and yet hold on to its fruits. This cannot be done. Common honesty and the law of the land alike forbid it. Whether the association was incorporated or unincorporated, whether the sec-

retary was or was not authorized to make the representations to Jones, it is clear that the association cannot have the benefit of the security and at the same time repudiate the contract by means of which they obtained it. No principle of law is better settled than that a man cannot reap the fruits of his agent's fraud: *Musser v. Hyde*, 2 Watts & S. 314; *Hunt v. Moore*, 2 Pa. St. 105; *Mundorff v. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531; *Keough v. Leslie*, 92 Pa. St. 424. The association took this security *cum onere*, and the maxim, *Qui sentit commodum sentire debet et onus*, applies."

*Jones v. National etc. Assn.*, 94 Pa. St. 215.

We will now quote from the case of *Sunbury Fire Ins. Co. v. Humble*, 100 Pa. St. 495, wherein the Court says:

"In this connection, it is proper to say that it matters little what were the powers of the agent who made the fraudulent representations by means of which the defendant was induced to take his policy, nor whether the agent himself believed them to be true. The company, having accepted the policy, is affected with any fraud upon the part of the person obtaining it. In other words, it cannot repudiate the fraud and yet retain the benefits of the contract. It takes *cum onere*."

*Sunbury Fire Ins. Co. v. Humble*, 100 Pa. St. 495.

We will now quote from the case of *Busch v. Wilcox*, 21 Am. St. Rep. 563, wherein the Court says:

"In other words, if we understand the proposition correctly, it is asserted that when one enters into a contract with a self-constituted agent who has no authority to act for another, and the person for whom the self-constituted agent assumes to act

adopts the contract so made in his name and behalf, thereupon it becomes the duty of the person so treating with the self-constituted agent immediately to notify or inform the principal of the instrumentalities made use of by such self-constituted agent to induce him to enter into the contract. In a case where such contracting party is free from fraud or collusion, and acts in good faith, we do not perceive that such duty is imposed upon him. He had no right to presume that the self-constituted agent has misrepresented facts to him, or that he intends to defraud him. On the contrary, we think it is the duty of the principal, or the person who becomes so by adopting the contract made in his name and for him, to make all needed inquiry and investigation into the facts, acts, and representations of the person who, without authority, has assumed to act for him before he adopts the contract as his own. For in adopting the contract he not only adopts it as written, but he thereby adopts as his acts all the instrumentalities of the self-constituted agent in obtaining the consent of the opposite party to enter into the contract. By adopting the acts of the self-constituted agent, he seeks to appropriate to himself all the benefits to be derived from it as fully as if he had himself induced it in the first instance, and with this he must assume all the liabilities which attach to it: *Wilson v. Tumman*, 6 Man. & G. 236; *Morse v. Ryan*, 26 Wis. 356; Kerr on Fraud and Mistake, 111; Bigelow on Fraud, 367; Broom's Legal Maxims, 708; Wharton on Agency, secs. 89, 90; *Fitzsimmons v. Joslin*, 21 Vt. 142, 52 Am. Dec. 46; *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283; *Elwell v. Chamberlin*, 31 N. Y. 611; *Presby v. Parker*, 56 N. H. 409; *Garner v. Mangam*, 93 N. Y. 642; *Bennett v. Judson*, 21 N. Y. 238; *Carpenter v. Insurance Co.*, 1 Story 57; *Mundorff v. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531; *Coleman v. Stark*, 1 Or. 115. \* \* \*

"The law, as we conceive it to be, is this: When a person deals with an authorized agent, he is bound to inquire and ascertain the extent and limit of his authority to bind the principal, and the principal is bound by all acts of the agent within the scope of his authority; and when a principal adopts the contract of a self-constituted agent who has assumed to act for such principal without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf, and the principal, when he becomes such by adopting his acts, is bound by all acts within the scope of the assumed authority; and in both cases the liability of the principal extends to the frauds or misrepresentations of the agent committed or made while acting within the scope of the real or assumed authority. We entertain no doubt upon the law that should govern the case."

*Busch v. Wilcox* (82 Mich. 336), 21 Am. St. Rep. 563.

We will now quote from the case of *Griswold v. Gebbie*, 12 Am. St. Rep. 878, wherein the Court says:

"The point that the plaintiff in error was not liable for the statements of her agent, John Griswold, is not tenable. The general rule that a principal is responsible for the misrepresentations of his agent, within his authority, is beyond question; and the better opinion is, that as to third parties affected by his acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern. That is the basis on which the business of the world in the present day is transacted, and the rule should be enforced in a liberal spirit, with regard to the actual habits of the community."

*Griswold v. Gebbie* (126 Pa. St. 353), 12 Am. St. Rep. 878.

We will now quote from the case of *Bennett v. Judson*, 21 N. Y. 238, wherein the Court says:

"A vendor of land is responsible for material misrepresentations in respect to its location and quality, made by his agent without express authority and in the absence of any actual knowledge by either the agent or the principal, whether the representations were true or false."

*Bennett v. Judson*, 21 N. Y. 238.

We will now quote from the case of *Mayer v. Dean et al.*, 5 L. R. A. 540, wherein the Court says:

"It is consonant with reason and justice that a principal should not be allowed to profit by the fraud of his agent; and if he adopts the contract made in his behalf, although ignorant of the fraud, he should be held liable to make compensation to the party injured by it."

*Mayer v. Dean et al.* (N. Y., 1889), 5. L. R. A. 540.

We will now quote from the case of *J. I. Case Threshing Mach. Co. v. Lyons & Co.*, 138 Pac. 167, in which the Court says:

"One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent ratifies the act, and takes it as his own, with all its burdens, as well as all its benefits. *U. S. F. & G. Co. v. Shirk et al.*, 20 Okl. 576, 95 Pac. 218; *Jack v. National Bank of Wichita*, 17 Okl. 430, 89 Pac. 219; *Fant v. Campbell et al.*, 8 Okl. 586, 58 Pac. 741."

*Case Threshing Mach. Co. v. Lyons & Co.*, 138 Pac. 167.

We will now quote from the case of *Wilson v. Mc-*

*Carthy et al.*, 134 Pac. 1189, wherein the Court says:

"The doctrine is well established and rests upon sound principles of law that a person who seeks to avail himself of a contract made by another for him, whether by appointment or by a self-constituted agent, is bound by the representations made and the methods employed by the agent to effect a contract. Defendant Nellie M. Rogers cannot ratify a part of the transaction negotiated by McCarthy and repudiate the same in part. *Grover v. Hawthorne Estate*, 62 Or. 65, 116 Pac. 100, 121 Pac. 804, and cases there cited; *Elwell v. Chamberlin*, 31 N. Y. 611, 619; *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809; *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 330, 21 Am. St. Rep. 563; *Griswold v. Gebbie*, 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878."

*Wilson v. McCarthy et al.* (Ore., 1913), 134 Pac. 1189.

In *Taylor v. Commercial Bank*, 174 N. Y. 181, 188, 66 N. E. 726, 728 (62 L. R. A. 783, 95 Am. St. Rep. 564), Judge Martin expressed, with care and precision, the principle determinative of the question whether or not the complaint was erroneously dismissed, as follows:

"It is an established principle of law that, where a person acts for another who accepts the fruits of his efforts, the latter must be deemed to have adopted the methods employed, as he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the fraud by means of which they arose."

*Taylor v. Commercial Bank*, 174 N. Y. 181, 188, 66 N. E. 726, 728 (62 L. R. A. 783, 95 Am. St. Rep. 564).

We will now quote from the case of *Day v. Merrick*, 138 N. W. 400, wherein the Court says:

"Furthermore, there is abundant evidence to sustain the proposition that the defendant ratified the fraudulent acts of his agent Hicks. By accepting the benefits of the transaction, he bound himself by the representations, and particularly is this true where the principal knows what such representations were, as did the defendant here. *Higbee v. Trumbauer*, 112 Iowa 74, 83 N. W. 812; *Lull v. Bank*, 110 Iowa 537, 81 N. W. 784; *Deering v. Bank*, 81 Iowa 222, 46 N. W. 1117; *Eadie, Guilford & Co. v. Ashbaugh*, 44 Iowa 519; *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563. That his cause should have been submitted to the jury is very clear to us.

See *Lenoch v. Yoss*, 136 N. W. 542."

*Day v. Merrick* (Iowa, 1912), 138 N. W. 400.

**PLAINTIFF'S ARGUMENT TO THE POINT THAT ALL REPRESENTATIONS MADE TO HER WERE STATEMENTS OF FACT, AND SUCH AS SHE WAS ENTITLED TO RELY UPON, EVEN HAD THERE BEEN NO CONFIDENTIAL RELATION.**

Plaintiff contends that all of the representations made to her by defendants, or their agents, were statements of fact upon which she, by the law, had a right to rely, and she had the right to rely upon them even though she had been dealing at arm's length with the defendants. Defendants and their agents represented to plaintiff that the land in question was first class alfalfa land; that it was all clear; that it was all level; that it was all protected from overflow by levee; that it was all river bottom land; that it was all sub-irrigated; that none of the land required irrigation for the growth of alfalfa, and that all of said

land was of such a character that it would produce five and six cuttings to the year, and the yield would be from eight to ten tons per acre each season. Those representations were statements of fact and could be relied upon by any person dealing with the defendants at arm's length and could be relied upon by an experienced man who then and there had the opportunity of examining the land. Defendants seek to contend that those representations, on the part of defendants and their agents, were in effect nothing more than what is known in law as "puffing" or "dealers' talk" and as such amounted to mere expressions of opinion and being but statements of opinion, plaintiff had no right to rely upon them, and it is their contention that it was up to the plaintiff to know about, and understand, those conditions or ascertain the true facts in reference thereto, independent from what they themselves stated to her.

This, we contend, is not the law. We contend, and we will substantiate our contention by the very latest and best authorities, that the statement that the land is all clear and level, is a statement of fact upon which plaintiff had a right to rely. We will show that the statement of the vendors and their agents, that the land consisted of 600 acres was a statement of fact upon which plaintiff had a right to rely, without any survey or investigation to verify the statement. We will show that the statements as to the extent of the crops produced was a statement of fact upon which plaintiff had a right to rely. We will show that the statement that the land was all sub-irrigated and that no irrigation

was necessary, was a statement of fact upon which the plaintiff had a right to rely. We will show that the statement that all of said land was river bottom land was a statement of fact upon which plaintiff had a right to rely. All of these representations were not a mere expression of opinion but were statements of definite, concrete facts, and we will go further and show that the statement that the land was first class alfalfa land, under the facts and circumstances of this case, was not a mere expression of opinion, but was also a definite statement of fact and as such definite statement of fact, could be relied upon by the plaintiff. We wish to state right here that the purpose of this brief is to establish the fact that plaintiff had a right to rely upon those representations, even though she had been dealing at arm's length, and for the purpose of this argument, we are assuming (which is not the case) that the plaintiff was actually dealing upon the same footing, at arm's length, and upon equal terms with the defendants. In other words, we are assuming that she was a man having as much experience as the defendants or their agents and that there was no confidential relationship existing between them or involved in the transaction; and, we will here state, that in practically all of those cases which the defendants will cite to support their contention, that the representations made to the plaintiff were nothing but mere "puffing," the statement of the doctrine is qualified by the statement that the rule is different where confidential relations exist. In other words, while "puffing" and "dealers' talk" and ex-

aggerated statements as to value or conditions, or future prospects, will, in certain cases go all right with a stranger dealing at arm's length, they nevertheless do not go where the person is not upon the same footing. The tendency of the modern cases is to restrict, rather than extend, the doctrine of *caveat emptor*, and the doctrine of *caveat emptor*, is, in all cases, more applicable to sales of personal property with personal present investigation, rather than in the sale of real property, such as in the case at bar. As the Court says in a case hereinafter quoted from, "the unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim." And as the Court says in another case which we will quote from, "there is no rule in law which required men, in their business transactions, to act upon the presumption that all men are knaves and liars". There was no duty upon plaintiff to have the statements of defendants or their agents verified. She had a right to believe them, and she had a right to believe them even though she had been dealing at arm's length.

The case of *Boltz v. O'Conner*, an Indiana case, decided in 1910, reported in 90 N. E. 496, was an action wherein the purchaser gave his seller a check for \$2,000, as earnest money on a contract for the sale of real property. After giving the check, but before it was cashed, the prospective purchaser discovered that the representations that had been made to him were not true, and he stopped payment on the check. The

vendor brought an action on the contract and the purchaser set up the defense that the check and his signature of the contract were procured through fraud, misrepresentation and deceit. The plaintiff demurred to his answer and the purchaser refusing to further plead, judgment went against him on the demurrer, from which judgment the purchaser appealed. In the opinion the purchaser is referred to as the appellant and the vendor is referred to as the appellee.

Appellant's answer in the trial court alleged, as grounds for relief, "that the soil of said real estate was not very productive, and it was not rich; that it was not a deep black, rich soil; that said real estate was not the richest in White County, and was not of the value of \$19,000, nor of the value of more than \$12,000; that the soil of said real estate was and is poor; that it is sandy, and the sand and gravel come up to near the surface of the ground, all of which appellee well knew at the time said representations were so made by him and his agent."

The trial court held that appellant's allegations in his answer did not constitute a defense and thus sustained plaintiff's demurrer, but the appellate court held otherwise, and in the latter portion of the opinion says:

"The next question for our consideration is whether representations that the soil was very productive, was rich, was deep, rich, black soil are representations of fact or merely expressions of opinion. The terms, 'rich soil', 'very productive', 'deep, black soil', when used in describing real estate, have certain definite meanings. 'Rich' is defined in this connection as fertile, fruitful;

producing or yielding abundantly, as rich soil, etc., of great price or money value; abounding in desirable or effective qualities or elements; of superior quality; opposed to poor (Cent. Dict.); yielding large returns; productive or fertile; fruitful, as rich soil or land. It is the opposite of poor (Webster's Dict.). It is hardly necessary to cite these definitions, as they are matters of common knowledge, understood by every one; and, in our opinion, the representations that the soil is rich; that it is fertile; that it is very productive—is the statement of a fact, unless qualified in some manner that would indicate that only an opinion or estimate was intended. It has been held in this state that such representations may be representations of facts. *Harris v. McMurray*, 23 Ind. 9. The descriptive terms used were material, directly affecting the value of the land. *Harris v. McMurray, supra*; *Norris v. Tharp et al.*, 65 Ind. 47.

“For the foregoing reasons we hold that the second paragraph of answer and the counterclaim were sufficient to entitle appellant to the relief asked, and the demurrers thereto should have been overruled.

“Judgment reversed with instructions to overrule the demurrers to said paragraphs and further proceedings not inconsistent with this opinion.”

*Boltz v. O'Conner*, 90 N. E. 496.

The case of *Woody v. Benton Water Co.*, 102 Pac. 1054, 132 Am. St. 1103, a Washington case decided in 1909. This is an action wherein the purchaser brought suit to recover for damages for false representations as to the quantity of land, and also as to the number of acres susceptible of irrigation from a certain canal. The trial court granted defendant's motion for

nonsuit and the Supreme Court, in passing upon the purchaser's appeal, said:

"Nor can we agree with the court below that the doctrine of *caveat emptor* applies to the representations made by the respondents to the effect that the entire tract was under the level of the canal and susceptible of irrigation therefrom. Strong language has been used by this and other courts in defining the duties of purchasers from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of *caveat emptor*. Thus, in *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444, the Court said: 'There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act upon that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' "

In *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069, the Court said:

"The unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim": See also *Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503, and cases there cited.

In 14 American and English Encyclopedia of Law, second edition, pages 120, 121, the rule is thus stated:

"By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge, or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself. By the weight of authority and in reason, the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain of the same, applies only where the parties have equal present opportunity and means to ascertain the truth at the time of the transaction, and does not apply merely because it is possible to ascertain the facts. Indeed, it has been held that a person is justified in relying on a representation made to him, in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth."

In *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883, this Court said:

"The main contention of the appellants is that this case comes within the rule often announced by this court that, where the vendor and purchaser are dealing at arm's length, and where the subject matter of the sale is at hand, the purchaser must protect himself and cannot rely upon representations made by the vendor. This rule is firmly established where the representations relate to the subject matter of the sale which is at hand, or to other facts the truth of which may readily be ascertained by the exercise of ordinary care and prudence. But the converse of this rule is equally well established where the subject matter of the

sale is not at hand, so that the truth or falsity of the representations concerning it may be ascertained, or where the representations relate to facts within the knowledge of one of the parties, and the truth or falsity of such representations cannot be ascertained by the other party upon reasonable investigation or by the exercise of reasonable care and prudence. Such are the cases of *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643, *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497; *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753, and *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. Rep. 880, 80 Pac. 559."

*McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883.

In the case of *Sargent v. Barnes*, 159 S. W. 366, at page 373, the court held that the following were representations of fact and not matters of opinion. Quoting the opinion:

"The testimony shows that appellee wanted to purchase first-class farming lands, which he intended to leave to his children; that he repeatedly told Norvell that he did not want any other kind or class of land; that he was an old man, unfamiliar with lands in Texas, and was compelled to rely upon his statement as to the character and nature of the land; that he did not want land that would overflow. It is shown that Norvell stated to him that the land was first-class farming land; that only about 2,000 to 3,000 acres thereof would overflow, and that during excessive storms from the Gulf. While there is some conflict in the evidence, these statements were shown to be untrue. At times all of said ranch would overflow, it appearing that it was covered with driftwood; that only about 1,000 acres thereof was good farming land, the balance being covered with wire or salt

grass, and was only fit for winter pasture, and was of far less value than it would have been if the representations had been true. We think the evidence satisfactorily shows that Norvell had authority and was expressly authorized by James Rugeley, the manager of this property, to sell same; and the circumstances also justify the conclusion that Mrs. Sargent and Mrs. Rugeley were cognizant of the fact that Norvell was undertaking to make a sale of the ranch to appellee and acquiesced therein."

*Sargent v. Barnes* (Tex., 1913), 159 S. W. 373.

In the case of *Allen v. Henn*, 64 N. E., page 250, the following representations were held to be material and not of opinion. Quoting from the opinion of Chief Justice Magruder:

"The contract so made between Allen and Henn was induced by the wrongful and fraudulent representations of Allen, made to Henn and his wife. The representations so made by Allen were to the effect that the tract of 290 acres was first-class, high, dry, river-bottom land, not subject to overflow; that it had not been overflowed within 10 years; that it was covered by very valuable saw timber, which had never been culled, consisting of hickory, white oak, burr oak, ash, sycamore, and other varieties of timber; that it was all virgin forest, except 40 acres, which 40 acres Allen wrongfully and fraudulently represented to be in a high state of cultivation; that the entire tract of 290 acres was worth and would sell for \$27 per acre in cash; and that the timber thereon could be readily sold to meet the payment of all of said notes as they matured."

*Allen v. Henn* (Ill., 1902), 64 N. E. 250.

We will now quote from the case of *Ross v. Sumner*, 78 N. W. 264, wherein the Court says:

"Plaintiff alleges as ground for relief and he so testified on the trial, that Mr. Sumner, during the negotiations for the exchange, represented to plaintiff that his land was level, consisted of a single tract, was worth at least \$50 per acre, was all under ditch, and could be easily irrigated, was good fruit land, and could all be cultivated. The defendant denies making the representations imputed to him, but plaintiff's version of the transaction is in several important particulars corroborated by the testimony of H. B. Strout, who, both parties agree, was present during a portion of the time the trade was being negotiated. \* \* \* These representations, which were shown to be false and untrue, were of a material character; and, having been relied upon by plaintiff, were sufficient cause for the rescission of the contract, and for the interposition of a court of equity."

*Ross v. Sumner et al.* (Neb., 1899), 78 N. W. 264.

We will now quote from the case of *Sikes v. Reiher*, 91 N. W. 920, wherein the Court says:

"It is true, as urged by counsel, that mere representations of value will not ordinarily sustain a charge of fraud or false representations; and, were that the only question here, there would be no room for argument. But these representations go much further, and include statements as to the topography of the tract, the presence of valuable timber, the tillable quality of the soil, and other things which are not to be regarded as mere matters of opinion, but are matters of fact pertinent to the negotiations; and plaintiff could rightfully rely thereon."

*Sykes v. Reiher* (Iowa, 1902), 91 N. W. 920.

In the case of *Neely v. Rembert*, 71 S. W. 259, the Court, in stating the rules by which representations should be judged, to be either material or of opinion, says:

"In this view appellee's case meets every test prescribed by this court for maintenance of suits of this character, which tests are as follows: '(a) Was the fraud material to the contract? Did it relate to some matter of inducement to the making of the contract? (b) Did it work an injury? (c) Was the relative position of the parties such, and their means of information such, that the one must necessarily be presumed to contract upon the faith reposed in the statement of the other? (d) Did the injured party rely upon the fraudulent statement of the other, and did he have the right to rely upon them in full belief of their truth?' *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546. The representations, or rather misrepresentations, of Neely, as to the area of the plantation, were material. He represented, by his deed, that the plantation conveyed contained 3,078.05 acres, more or less. The actual survey showed 2,545 acres, or a difference of .533 acres. He represented the cleared land in actual cultivation to be 1,100 or 1,200 acres, whereas the actual survey showed 900 acres. Rembert wanted a plantation that contained at least 3,000 acres of land susceptible of cultivation. Instead he gets a plantation containing 2,545 acres in all, and with not more than 1,500 or 1,800 susceptible of cultivation. These discrepancies are too great to be remedied by abatement in the purchase price or by suit on warranty. They go to the very foundation of the contract of purchase, and shatter it. They were material inducements to the contract, and were such as to deprive the appellee substantially of the benefits of his purchase. *Fitzhugh v. Davis*, 46 Ark. 337. The same may be said also of the

representations concerning the cocoa grass. *Oswald v. McGehee*, 28 Miss. 340.

Appellant contends that the false representations are not ground for equitable relief in this action, 'unless the vendor knew them to be false and the vendee had no means of discovering their falsity.' This is not the law applicable to positive statements or representations of fact (and not of opinion) which were substantial inducements of the contract. 'A vendor who makes a false statement regarding a fact material to the sale, either with knowledge of its falsity or in ignorance of its falsity, when, from his special means of information, he ought to have known it, and thereby induces his vendee to purchase to his damage, is liable in an action at law for the damage the purchaser sustains through the misrepresentation, or to have the sale rescinded in a suit in equity, at the option of the purchaser.'

*Neely v. Rembert* (Ark., 1902), 71 S. W. 259.

In the case of *Best v. Offield*, 110 Pac. 17, the facts were as follows:

Plaintiff and wife were unfamiliar with farm lands and the fruit business. They purchased a farm from defendants who misrepresented it as to the amount of land and the different varieties of fruit in the orchard, quality of fruit that would be produced, and as to the sufficiency of water to irrigate the farm. The Court, in deciding the case, says:

"There is a difference between the right of a vendee to rely upon the representations of the vendor where the means of determining the truth of the representations are at hand and it is easily determined, as in the case just cited, and a case of this kind where, as shown by the testi-

mony, these plaintiffs were entirely unfamiliar with the fruit business, having come from a locality where orchards were not grown. They stated to the defendant at the time of the transaction that they knew nothing about the business, and when they were down examining the orchard, told him that they did not know a peach tree from a cherry tree, and in many instances he pointed out to them the difference in the trees.

This case falls more squarely within the rule of law announced in *Woody v. Benton Water Company*, 54 Wash. 124, 102 Pac. 1054. There the action was instituted to recover damages for false representations made by the defendants in the negotiations leading up to the contract of sale, both as to the quantity of land to be conveyed and the number of acres susceptible of irrigation from the water company's canal by gravity flow. The defendants represented that the tract to be conveyed by the water company contained 60 acres in all, and that the 60 acres were so situated in reference to the water company's canal that the entire tract could be irrigated therefrom by gravity flow. It eventuated that in fact the tract contained only 52.64 acres, and 28.24 acres of this were above the level of the canal and could not be irrigated therefrom. It also appeared that the purchaser visited the land accompanied by certain of the grantors and viewed the premises in a general way. But it appeared that the portion of the land which could not be irrigated from the canal could only be ascertained by an accurate survey, as, we think, it appears in this case that the area of this orchard could only be obtained by an accurate survey. The Court in the trial of that case, upon the close of the plaintiff's testimony, granted a nonsuit to the defendant."

*Best v. Offield* (Wash., 1910), 110 Pac. 17.

In the case of *Swayne v. Waldo*, 33 N. W. 78, the Court found that the defendants "represented and warranted the lands to be choice, well-lying land, and in every respect first-class farm land, lying within about two miles of O'Connor, Nebraska," and that such representations were of material facts and not of opinion.

In the case of *Strand v. Griffith*, 97 Fed. Rep. 854, the Court says:

"The law will not reward dishonesty and falsehood, and punish confidence and trustfulness, in any such way. The rule of *caveat emptor* is not founded on the highest standard of morals, but it is no longer a shield and protection to the deliberate frauds and cheats of sharpers. Where falsehood or deceit is practiced by the vendor for the purpose of throwing the purchaser off his guard, and inducing him to make the purchase without first making personal examination of the thing purchased, which, but for such fraudulent practices, he would have done, it does not lie in the mouth of the vendor to say that by giving credit to his false and fraudulent representations the purchaser must be held to have been cheated and defrauded as the result of his own negligence and credulity. \* \* \*

The vendor cannot complain that the purchaser relied too implicitly on the truth of representations he himself made, knowing them to be false, but intending that they should be received and acted upon by the purchaser as true."

*Strand v. Griffith*, 97 Fed. Rep. 854.

We will now quote from the case of *Hale v. Philbrick*, 42 Iowa, 81, wherein the Court says:

"We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood."

*Hale v. Philbrick*, 42 Iowa 81.

In the case of *Reynell v. Sprye*, 1 De Gex, M. & G. 549, the Court said:

"However negligent the party may have been to whom the incorrect statement has been made, yet, that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of things he has himself stated."

*Reynell v. Sprye*, 1 De Gex, M. & G. 549.

We will now quote from the case of *Hooch v. Bowman*, 60 S. W. 389, wherein the Court says:

"The purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property when the facts concerning which the representations are made are unknown to the vendee; and if a vendor makes material representations as to the character, quality, and location of his real estate, and the vendee believes, relies and acts upon these representations and they turn out to be false, the vendor cannot then shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on the part of his vendee. This rule is supported by all the authorities. Where one assumes to have knowledge of a subject of which another may be ignorant, and knowingly makes false statements regarding it, upon which the other relies to

his injury, the party who makes such statements will not be heard to say that the person who took his word, and relied upon it, was guilty of such negligence as to be precluded from recovering compensation for injuries which were inflicted on him under cover of falsehood. *Eaton v. Winnie*, 20 Mich. 156. The omission by one of the parties to an agreement to make inquiries as to the truth of facts stated by the other cannot be imputed to him as negligence. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement."

*Hook v. Bowman* (Neb., 1894), 60 N. W. 389.

In the case of *Dwinell v. Watkins et al.*, 126 N. W. 304, the facts were as follows:

Defendant Dwinell and his wife kept a rooming house and grocery store and being desirous of disposing of the property, employed one Loman, as agent to find a purchaser. Loman, who, it afterwards appeared, was a friend of the plaintiff and also acting as his agent in disposing of his farm property. Loman, acting under dual capacity as agent of both parties, brought them together and went out to the ranch of Watkins. During this time, defendant did not know that Loman was also acting as the agent for Watkins. The land was represented to be all good tillable land; that there were only 85 acres under cultivation, but that it could all be cultivated and that Loman also stated the land to be worth \$6,500. Upon these representations an exchange of properties was effected. It

afterwards turned out that the land was mostly sandy and gravelly, and that only a small portion of it was susceptible to cultivation. The Court, in deciding the case, says:

“But he contends that no fraud has been shown; that when parties are negotiating for property which they are afforded an opportunity to examine and which they do examine each has the right to exalt the value of his property and depreciate the value of the other’s, and that such assertions of value do not amount to fraudulent representations. He also contends that both parties knew that Loman was the agent of both, hence there was no deception as to his relation to the parties. On the other hand, the defendants contend that the representations of Dwinell and Loman as to the condition, quality, and value of the land were statements of a fact made to Watkins after he informed them that he knew nothing about the quality or value of the land, and that he would rely upon their representations; that Loman, while acting ostensibly as his agent, fraudulently dissuaded him from making inquiries, and that if he had known that Loman was acting for Dwinell he would not have relied upon his statements, and would have made other investigations.”

*Dwinell v. Watkins* (Neb., 1910), 126 N. W. 304.

In the case of *Oneal v. Weisman*, a Texas case decided in 1905, reported in 88 S. W., at page 290, the Court says:

“Appellant objected to the admission of Weisman’s testimony that Oneal told him prior to the trade that the Morris county land was good, fertile land, very productive, would raise corn,

cotton, fruits, and vegetables, and was well worth \$15 per acre; that there was a sawmill running daily, and it was in good order and of the value of \$5,000. The objections were that plaintiff's pleadings were not verified—there being a plea of failure of consideration—and such evidence was irrelevant and immaterial, and its tendency was to prejudice the defendant's case. The rule is that, where a party is trying to effect a sale of his property, it seems, he has the right to puff the same in the most extravagant manner, and to exalt the value to the highest point the vendee's credulity will bear. The vendee in such cases is not expected to place confidence in such statements, and, if he does, it is not sufficient upon which to base an action for damages, it matters not how false they may be. Such statements are regarded as mere opinions, and the purchaser is not expected to rely thereon, but must rely on his own judgment. The foregoing is based on the proposition that the parties to a contract stand upon an equal footing, and their opportunities for knowing the facts or forming judgment as to the true condition of the property are equal. Where, however, there is a fiduciary relation existing between the parties, or where the situation of one of the parties is such that he has not an equal opportunity of forming a correct judgment and is ignorant of the true conditions, but is induced to rely upon such statements and to purchase by reason of his faith therein, then 'the vendor may be held liable as for false representations, because by them the purchaser has fraudulently been induced to forbear inquiry as to their truth.' Warvelle on Vendors, sec. 946, vol. 2. As it is difficult at times to distinguish opinions from statements of facts, the general rule as above stated must be accepted with some qualification. Mr. Warvelle, sec. 947, states the distinction as follows: 'Thus, if the vendor, knowing them to be untrue, makes statements with the intention of misleading the

vendee, and if the latter, relying upon them, is misled to his injury, or if he induces the vendee not to make inquiries with respect to value, or any extrinsic facts affecting values, or makes statements in such a manner that the vendee, instead of being put on inquiry, is put off his guard, it has been held that a substantial right to recover damages is created, or the vendee may, at his option, avoid the contract. To effect this, however, the representations must, as a rule be coupled with other circumstances, as where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing and where he is induced by the vendor's artifice to forbear inquiries which he would otherwise have made; but whether a representation as to value is merely an expression of opinion or belief, or an affirmation of fact to be relied on, is a question for the jury, and should properly be left to their decision. Again while the purchaser must rely upon his own judgment in questions of value, yet, in regard to any extrinsic facts affecting the quality or value of the subject of the contract, he may rely upon the assurances of the vendor; and, if he does so rely, and those assurances are fraudulently made to induce him to enter into the contract, he may maintain an action for the injury sustained.' \* \* \* As to the statements of Oneal as to the fertility, etc., of the land, and as to the qualities of the sawmill, we think such were statements of facts, which, if false, and were relied on and induced the purchase by Weisman, were admissible in evidence. But whether or not they would constitute fraud, and be sufficient upon which to base an action of deceit, depends upon whether or not the situation under the circumstances surrounding the parties warranted Weisman in relying on such statements, and that he did so rely thereon. If the facts show that he was not so warranted, or did not rely thereon, then the court should have excluded said

testimony, though it had been admitted before the facts were fully developed. If it does not conclusively appear, then it is a question to be submitted to the jury."

*Oneal v. Weisman* (Tex., 1905), 88 S. W. 290.

We will quote from the case of *Connecticut Mut. Life Ins. Co. v. Carson*, 172 S. W. 69. This is a Missouri case, decided in December, 1914. This is a very recent case, being but a few months old. This case was a dispute between vendor and purchaser, in which the purchaser had been misled by false representations made by the vendor's agent. Relief was granted to the purchaser upon the grounds that the purchaser had been misled to his damage. In this case the purchaser is referred to as the defendant, the vendor is referred to as the plaintiff. The agent was a person by the name of McKnight. This case decides that a circular or prospectus describing real property may be admitted in evidence. This case also holds that it makes no difference whether the agent, in making the false representations, knew them to be false. It is sufficient if he merely made them recklessly and without sufficient information or justification. The Court holds that it is no answer to the suit of the purchaser that the plaintiff's agent believed the representations which he made were true; and this case also holds that where the owner of land pays a real estate agent or broker a commission in the sale of it, and in that sale the broker made false representations, the owner, although unaware of the fraud, is chargeable therewith, and the owner is held to be

chargeable with the fraud notwithstanding the fact that he did not authorize it.

The opinion reads:

"The defendant saw the advertisements of W. Ross McKnight's scheme printed in one of the St. Louis daily newspapers. He was a clerk working in East St. Louis on a salary, and was not familiar with farming or agricultural land and so informed McKnight. He called on McKnight after reading the advertisement and received a prospectus of the scheme and a circular with McKnight's name stamped upon it. This circular was one put out by the plaintiff, a number of them having been turned over to McKnight by Collins when they perfected the arrangement to deed the lands. The prospectus issued by McKnight contains many things contained in the circular issued by the plaintiff. It covers 10 pages of the printed abstract, and under heavy headings it takes up, first, a description of the general nature of the scheme, then a description of Southeast Missouri and Stoddard county, followed by headings such as, 'Soil, Water and Rainfall,' 'Crops and Stock Growing,' 'Climate,' 'Topography,' 'Tract Selected,' 'The Colony,' and, lastly, the terms of settlement. It contains many representations which are promissory in nature and many that might come under the term 'puffing,' and others that border closely on representations of existing facts. The defendant was given an application to sign, entitling him to become a purchaser in the colonization scheme. Defendant went with McKnight and looked over the land on a rainy day when the soil appeared black or dark. The natural color of the soil when dry was light. Defendant says, and we have no reason for doubting him, that W. Ross McKnight made the following representations, which were relied on by him, and which induced him to become a purchaser: That the lands were all well

drained, and that this was not true; that arrangements had been made with the Iron Mountain Railway Company to place an agency at Reeds Spur, which was very near plaintiff's property, and that at the time of the trial, which was several years after the representation was made by McKnight, no such agency had been established; that this land would not overflow, and that it does overflow.

"(1) We are convinced, after reading the evidence, that these representations were untrue and were false, and that McKnight knew they were false, or did not have sufficient knowledge on the subject to warrant him in asserting that they were true. This brings his conduct within the rule laid down in *Ray County Savings Bank v. Hutton*, 224 Mo. loc. cit. 70,123 S. W. 47, that a statement made carelessly without caring whether it be true or false, which proves to be untrue, is fraud, and such as that an action for fraud and deceit can be maintained by one damaged thereby. See, also, *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783, and cases cited.

"It is true that a great many of the representations made by McKnight to defendant were in the nature of promises or descriptions of what would take place, and others that would probably escape criticism in an action for fraud, and deceit because they were mere 'puffing,' and these of course, standing alone, would not sustain a charge of fraud. But where statements of existing facts are made by one knowing them to be untrue, or made carelessly, not caring whether they are true or false, followed by one being induced thereby to part with money to his damage, this will sustain an action for fraud and deceit. It is no answer to say that McKnight had faith in his project or believed in his scheme, or that he himself lost a large sum of money in trying to put it through. Such a defense would make possible the perpetration of the most flagrant frauds

and permit the wrongdoer to go free because he would say he believed what he was saying. Ordinary sensible men require something of substance on which to base belief and not a mere fancy or an imagination; an expression based on such 'belief' amounts to recklessness.

"(2) In order to hold plaintiff for McKnight's fraudulent representations, we must examine the relation that existed between them. Collins was the *alter ego* of the plaintiff in this matter, and he says that W. Ross McKnight sold this property to defendant as the agent of the plaintiff, and that plaintiff paid him a commission for making the sale. McKnight was the only party that defendant dealt with, and it was McKnight who delivered plaintiff's warranty deed and carried out the contract made on December 31st, evidenced by the receipt showing that the lands were owned by plaintiff, and that it would make a warranty deed; and it was McKnight who accepted the first payment for the land, together with the notes for the remainder, which were made payable to the plaintiff and secured by a deed of trust, all of which were delivered by McKnight to the plaintiff. Plaintiff afterwards wrote from its home office in Connecticut, demanding payment of the notes and interest as it became due. And finally, after defendant had advised plaintiff of the representations made by McKnight, plaintiff foreclosed under the deed of trust, which it accepted from McKnight, bought in the property, and then brought suit for damages against the defendant. Enough was shown to evidence the relation of principal and agent. In any event, the plaintiff did accept the benefits of the bargain made by McKnight, sought to enforce the contract, and to this day, so far as the record shows, in no way repudiated the transaction which was put through by McKnight. The law is well settled that where the owner of land pays a real estate agent or broker a commission to sell it, and in doing so the

agent makes false representations concerning the land which induce a customer to buy, such owner, although unaware of the fraud, when he accepts the benefits of the transaction, is also ladened with the burdens thereof, and in such case the fraud of the agent or broker is chargeable to the owner. The cases go to the extent of holding an owner for the representations of an unauthorized agent if the owner adopts the trade made and accepts the benefits that flow from the bargain; the representations complained of, however, must be such as would naturally fall within the apparent scope of the agent's employment. In our case, the false representations were made as to the character and formation of the land, its nearness to a railroad agency, that it did not overflow, and that it had natural drainage. These things might naturally be expected to induce a sale of the property. We find in the case of *Millard v. Smith*, 119 Mo. App. loc. cit. 711, 95 S. W. 942, the following quotation which the court in that case said is unquestionably the law:

"There is no doubt of the general proposition that, if an agent is employed to effect the sale of lands for his principal, and he does so by means of false representations in respect to the land conveyed, even without the authority or knowledge of his principal, the later is chargeable with such fraud in the same manner as if he had known or authorized the same.'

"In *Williamson v. Tyson*, 105 Ala. 644, 653, 17 South. 336, 339, this language appears:

"The general rule of law that one who deals with an agent is bound to know the extent of his authority is fully recognized, and one absolutely necessary to the protection of a principal in all actions brought against him founded upon contracts made by an agent. The doctrine is equally as well established, and rests upon sound principles, that a principal who seeks to avail himself of a contract made by another for him,

whether by an appointed or a self-constituted agent, is bound by the representations made and methods employed by the agent to effect the contract.' Citing many cases.

"There can be no reasonable distinction drawn between a tort brought on through fraud and one brought on through negligence. The principal or master is held where the transaction was concerning his business and from the doing of which he derives benefit. This rule works no hardship on a landowner, because, in the first place, he can select who is to sell his property, and again, before accepting the negotiations of the agent he can inquire of the purchaser as to what representations, if any, the agent made. The reason for such rule is that where one of two innocent persons must suffer, it is nothing but right that the burden be saddled on the one who put it in the power of the wrongdoer to perpetrate the wrong. This entire question is thoroughly discussed in 2 Mechem on Agency (2d ed.), sections 1984 to 1996, inclusive, preceded by the title, 'Liability for Fraudulent Acts and Representations' (of an agent), where in the foot-notes many cases from the different states and England are cited as upholding the rule announced here. We, therefore, hold that the plaintiff is chargeable with the fraud worked on defendant by W. Ross McKnight."

*Connecticut Mut. Life Ins. Co. v. Carson* (Mo. 1915), 172 S. W. 69, 186 Mo. 221.

We will now quote from the case of *Post v. Liberty*, 121 Pac. 475, wherein the Court says:

"Having determined, as we do, that the plaintiff established the facts claimed by them, with reference to the representations made by defendant respecting the location of the east boundary line of the land which he sought to sell, that they did not know the location of the land, but

relied upon the representations made by defendant, believing them to be true; that they would not have purchased the land had they known that more than 200 acres lay east of the road, and that the land shown them was of much greater value than the same quantity, including these 200 acres, of rough, hilly land east of the road, the question then arises, What effect do such representations have upon the sale when it appears that they were erroneous? The question is not a new one. It has been considered by the courts in many cases, and the decisions are quite harmonious and founded in sound reason. The theory upon which they proceed is that the owner of real estate is presumed to know the location of his land, and if, in attempting to sell it, he undertakes to point out its location or its boundaries, he is bound to do so correctly. In other words, his representations amount, in effect, to warranties, and if the land he points out is of greater value than the land he actually sells, the purchaser may rescind the contract, or sue for damages."

*Post v. Liberty* (Montana, 1912), 121 Pac. 475.

We will now quote from the case of *Crandall v. Parks*, 152 Cal. 772, wherein the Court says:

"A statement as to the value of property is not always made as a mere expression of opinion upon which the other party has no right to rely. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such it is like any other representation of fact, and may be a fraudulent misrepresentation warranting rescission. The rule in regard to this matter is stated by Mr. Pomeroy as follows: 'Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own

opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such; then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation.' (2 Pomeroy's Equity Jurisprudence, section 878.) He further says that the statements which most frequently come within this branch of the rule are those concerning value."

*Crandall v. Parks*, 152 Cal. 776.

We will now quote from the case of *Strait v. Wilkins*, 16 Cal. App. 188, wherein the Court says:

"The rule that 'wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such,' then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation."

*Strait v. Wilkins*, 16 Cal. App. 188.

We will now cite the case of the *Baron Estate Co. v. Woodruff Company*, 163 Cal. 561. In this case the plaintiff was a corporation composed of members of the family of Edward Baron, deceased. The stockholders were heirs of the deceased, and none of its officers or stockholders knew anything or had any knowledge of architecture or of the construction of buildings. The defendant, by fraudulent representations, represented to the plaintiff that it would construct a first-class hotel for the plaintiff, not to

exceed the sum of \$300,000. Defendant represented to the plaintiff that he had special skill and great experience in matters of this kind, and that the cost of the building would certainly not exceed \$300,000, but in all probability would be less. After the work had progressed on the building, and several payments had been made, it became apparent that the building would probably cost more than \$400,000, whereupon the defendant stated to plaintiffs, and to lull them into false security, that plaintiff would be entitled to receive large credits on account of moneys already expended for extra material ordered by defendants. Afterwards, in response to repeated demands on the part of the plaintiff as to how much less than \$400,000 the building would cost, the defendants informed the plaintiff for the first time that the building would cost \$510,000. Thereupon plaintiffs immediately stopped work and employed competent and honest experts to make an estimate of the cost of finishing the building, and was informed by these experts that to complete the building it would require the sum of not less than \$700,000. Plaintiff brought this action to recover the false representations made by the defendants, and the Court, in deciding the case, was of the opinion that the representations made by defendants were statements of fact, and not of opinion, and in deciding the case says:

“It is of course, generally speaking, true that an action for deceit cannot be founded upon the mere expression of an opinion. But the qualifications and modifications of this general rule are as

important as the rule itself. Those qualifications and modifications are numerous. It is unnecessary to attempt to illustrate them all, but, bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker *believes to be* a fact, it becomes apparent that by the expression of a dishonest opinion to one entitled to rely upon it, deceit is practiced, injury may be worked, and an action will lie."

*Barron Estate Co. v. Woodruff Co.*, 163 Cal. 573.

We will now quote from the case of *Eichelberger v. Mills Land, Etc., Co.*, 9 Cal. App. 628, wherein the Court says:

"Courts of equity will not withhold relief from parties ignorant of the true condition, who, relying upon false representations as to material facts made for the purpose of inducing assent, are thereby inveigled into contracts, upon the ground that there were circumstances calculated to arouse their suspicion and cause an investigation whereby they might have discovered the swindle. The liability of the defendant arises from its own fraud and false representations, and is unaffected by the question of diligence on the part of plaintiffs in availing themselves of the opportunity afforded for determining the size of the tract of land, or their failure to give heed to such warning as the exhibition of the map afforded of defendant's dishonesty. \* \* \*

"In the absence of any inquiry instituted by plaintiffs for the purpose of ascertaining the dimensions of the land, and in the absence of knowledge as to the true dimensions, both of which facts appear from the findings, plaintiffs were warranted in relying upon the representations in that regard made to them by the seller, Mills Land & Water Company. \* \* \*

"The effect of these findings is that plaintiffs, instead of measuring the land and for themselves ascertaining the dimensions thereof, as they could have done, chose rather to rely upon the representations of defendant in relation to the same. Were they justified in so doing? As the representations were made prior to the transaction and directly related to it, it must be presumed that they were made for the purpose and with the design of inducing plaintiffs to enter into the contract. (Pomeroy's Equity Jurisprudence, section 880.) As a general rule the owner of real estate, in the absence of facts showing the contrary, is presumed to know the boundaries and area of his land, and a buyer is warranted in relying upon his representations in respect to such facts. It is immaterial whether the representations as to area be as to acreage or dimensions."

*Eichelberger v. Mills Land, Etc., Co.*, 9 Cal. App. 628.

We will now quote from the case of *Stevens v. Giddings*, 45 Conn. 507. In this case the line of a lot was represented as being 100 feet, whereas it was only 95½ feet. In its opinion the Court says:

"The controlling factor in this case is that there was a material deficiency in the quantity of land sold. \* \* \* It would be altogether unusual for the purchaser to measure the depth of a lot after the seller by his circular had represented it to be of a certain depth, and his agent \* \* \* had positively asserted at the time of the sale that it was of that depth. \* \* \* We think the defendant had the right to rely on the representations of plaintiff and on the declarations of the auctioneer."

*Stevens v. Giddings*, 45 Conn. 507.

We will now quote from the case of *Lynch v. Mercantile Trust Co.*, 18 Fed. 486, wherein the Court says:

"The owner of property, when he sells, is presumed to know whether the representation which he makes about it is true or false, and the positive statement thus made of a material fact, if false, is a fraud in law. A purchaser trusts in the owner's statements, and the law will assume that the owner knows his own property and truly represents it."

*Lynch v. Mercantile Trust Co.*, 18 Fed. 486.

We will now quote from the case of *Quarg v. Scher*, 136 Cal. 406 (69 Pac. 96). In this case the contract described the land by metes and bounds and as "containing about forty acres, more or less." It was afterward ascertained by survey that the acreage in the tract was but 23½ acres. The Court, in rendering its opinion, said:

"It is next insisted that the defendant saw the land and inspected it before making the contract, and, having every opportunity to learn of the quantity of the land, he had no right to take the word of plaintiffs on the question of quantity; in other words, that the rule of *caveat emptor* applies to the case. This contention is not well founded; the defendant had a right to rely on plaintiff's representation as to the quantity of land. The acreage of land is a thing that cannot be seen with the eye at a glance, but can only be ascertained with accuracy by scientific measurement, and when a vendor states to a vendee the amount of land in the tract which is the subject of the sale, such vendor will not thereafter be heard to say in a court of equity

the vendee had no right to believe him. (*Pringle v. Samuel*, 1 Litt. (Ky.) 43, 13 Am. Dec. 214.)"

*Quarg v. Scher*, 136 Cal. 406.

We will now quote from the case of *Bickel v. Munger*, 20 Cal. App. 633, wherein the Court says:

"In the case of *Rendell v. Scott* it is asserted that representations that a ranch was very rich and productive and would produce fifty bushels of wheat to the acre, and that a portion was good alfalfa land, and another portion rich in mineral deposits, were to be considered as matters of opinion rather than as false representations of facts where there was no averment excluding the idea that personal inspection had been had by the purchaser. We do not doubt, however, but that a cause of action might be predicated upon representations made as to condition and quality of soil and like matters, even though the same was exhibited to the party complaining, where such party was ignorant and inexperienced in such matters, and the party making the representations knew this and knew that the person with whom he was dealing relied upon him to express the truth as to such things. The Court here found that plaintiff and her sons, son-in-law and daughter were inexperienced in the business of ranching, and that plaintiff relied upon the representations made to her by Munger, and that the representations were made for the purpose of inducing plaintiff to make the exchange, and with the intention on the part of Munger that she should act in reliance upon such representations."

*Bickel v. Munger*, 20 Cal. App. 636.

**ARGUMENT TO THE POINT THAT THE RELATIONSHIP BETWEEN PLAINTIFF AND RAMOS WAS CONFIDENTIAL IN CHARACTER.**

We have, in law, what is known as fiduciary or confidential relationships, as, for instance, husband and wife, guardian and ward, and attorney and client. These relationships are of personal trust and confidence, and where a relationship of this character exists the person occupying the stronger position is held to the utmost good faith in respect to any bargain or transaction where money or profit passes between them. Thus, in the case of attorney and client, where in the course of their relationship an attorney purchases something from the client, or enters into some transaction with the client in respect to property, the attorney is held to the utmost good faith, and when the finger of accusation points toward any such transaction, the burden is at once thrown upon the stronger party to show that the transaction was perfectly fair and just in respect to the welfare of the weaker person.

These statements are elementary. The only point covered by this brief is that the relationship existing between a man and woman engaged to be married is such a relationship, and in respect to business transactions between the parties is in the same category with transactions between attorney and client, or guardian and ward. In other words, it is the purpose of this brief to show that persons engaged to marry occupy fiduciary relations.

We will now quote from the case of *Kline v. Kline*, 98 Am. Dec. 206, wherein the Court says:

"There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arm's length, we think is a mistake."

*Kline v. Kline*, 98 Am. Dec. 206, 57 Pa. 120.

We will now quote from the case of *Pierce v. Pierce*, 27 Am. Rep. 23, in which the Court says:

"The relation of parties who are about to enter into the marriage state is one of mutual confidence, and far different from that of those who are dealing with each other at arm's length. This is especially true of the woman, and it is the duty of each to be frank and unreserved when about to enter into an ante-nuptial contract, by a full disclosure of all the facts and circumstances which may in any way affect the agreement."

*Pierce v. Pierce*, 27 Am. Rep. 23, 71 N. Y. 154.

We will now quote from the case of *Wadell v. Lanier*, 62 Ala. 347, wherein the Court says:

"In all the variety of relations of life in which confidence is reposed and accepted, and dominion may be exercised by one person over another, the court will interfere and relieve against contracts or conveyances when they would abstain from

granting relief if any particular relation existed between the parties in which trust and confidence was reposed and accepted, and there was not an opportunity for an abuse of the confidence and the exercise of undue influence."

*Wadell v. Lanier*, 62 Ala. 347.

Schouler on Domestic Relations, section 183:

"Owing, moreover, to the confidential relation which subsist between the parties, an ante-nuptial contract which appears to have been unfairly procured will be set aside."

We will now quote from volume I, Bigelow on Fraud, 351:

"Undue influence may easily be exercised under the intimate relation created by an engagement to marry."

#### **ARGUMENT TO POINT THAT FORMER SUIT IN THE STATE COURT IS NOT A BAR TO THIS ACTION.**

Defendants set up as a special defence in their answer to this action that plaintiff is debarred and estopped from bringing this suit by reason of the fact that before this action was commenced she had previously commenced an action in the State court in Sutter County, the complaint in which said action contained allegations sufficient to entitle plaintiff to rescission. The facts in this matter are, that before this action was commenced, plaintiff commenced an action in the State court in Sutter County based upon the same transaction as this present action. The

complaint in the State case contained allegations sufficient to sustain a prayer for rescission, and also contained allegations sufficient to entitle a rescission, and also sufficient to entitle plaintiff to a money judgment for damages for deceit. The prayer in the complaint of the State case says nothing of rescission, but does ask for damages, as is alleged in defendants' answer to the present case.

Defendants now contend that the commencing of that action in the State court amounted to an election and choice as between two inconsistent remedies, and that, having elected to stand upon one, she was thereafter debarred and estopped from pursuing the other. The digest and encyclopedias are full of general statements to the effect that where a plaintiff has before him two separate, distinct and inconsistent remedial rights, he must choose as to which one he will stand upon, and, having made an election, he is thereafter precluded from returning to the one he abandoned. As a general proposition this rule is no doubt correct, but when a specific case presents itself, it must be first ascertained whether or not the case comes within the rule. In the first place are the two remedies presented, inconsistent—that is, must one be chosen and the other abandoned. In the present instance it is also essential to determine whether or not the institution of the prior suit amounted to a final election. Thus, in deciding the question as to whether or not defendants' contention is sound, we must first decide whether or not the remedy of rescission and the remedy by money judgment for damages

are inconsistent to such a degree that one must be chosen and the other abandoned before action brought or before trial.

The next question is, was the filing of that suit in the State court a final election as between two inconsistent remedies? The plaintiff contends in this reply that the two remedies are not inconsistent, and that no choice or election as defendants contended for is necessary, and plaintiff also contends that the commencement of the action in the State court in Sutter County and its dismissal before trial do not amount to an election. In the first place, we want to state that where a person finds himself defrauded in a real estate transaction, and after the discovery of all the facts, he commences an action purely for money damages, without any reference whatever to rescission and without alleging facts necessary for a rescission, he would be thereafter debarred from prosecuting an action for rescission. The estoppel in that case, however, would not be by reason of the fact that he had made an election as between two inconsistent remedies, but the estoppel would be by reason of the fact that in filing the suit for damages purely he stood upon the contract, and his standing upon the contract amounted to a ratification of the contract, and, having ratified the contract, he would necessarily be thereafter estopped from repudiating it. He would be precluded from thereafter suing for rescission by reason of equitable estoppel. His standing upon the contract and his ratification of it in bringing the suit for damages amounted to a notification to the defend-

ants that he intended to keep the property, in which case the defendants might be led into so altering their position as to be at a disadvantage in case rescission were thereafter sought. Such is not the case, however, where rescission is sought first and thereafter abandoned in lieu of a prayer for money damages. The two remedies are not inconsistent, and they may be sought in the same action at the same time, without any necessity of election before trial. Rescission is an equitable remedy which a plaintiff may have during a limited time in certain special cases. A money judgment for damages is a legal remedy which plaintiff may have at any time within three years after the discovery of the facts constituting the fraud. Under the State practice a plaintiff, upon finding himself defrauded in a real estate transaction, by acting promptly, in certain cases, may compel the defendant to trade back, so to speak, and in the same complaint he may set up facts entitling him to a money judgment, and in the same action may obtain the legal remedy in damages, together with the equitable remedy of rescission. He may compel the defendant to give back what he received in return for what he gave, and also give the plaintiff certain money as damages. Under the State practice the case may go to trial, and it may develop for various reasons that rescission is impossible, or that plaintiff is not entitled to rescission, but that plaintiff is entitled, under the pleadings and the proofs, to legal redress in the shape of money judgment for damages. In such a situation the rescission sought is the chief

and special remedy, and the damages sought is in the nature of an ancillary or supplemental remedy. The legal remedy for damages is a sort of alternative or second choice relief. That these propositions are sound, I do not think will be seriously disputed. Under the State practice a complaint may allege facts entitling the pleader to both an equitable and legal relief—that is, entitle the plaintiff to either or both damages and rescission. Upon the proofs he may be given either damages or rescission, or both.

In support of this contention we cite Pomeroy's Code Remedies, section 76 *et seq.*, wherein the writer treats of "The combination by the plaintiff of legal and equitable primary rights and of legal and equitable remedies in one action." We also refer to the Michigan case of *Glover v. Radford*, 79 N. W. 803, from which case we will hereinafter quote.

It cannot be contended that the commencement of the action in the State court and its dismissal without prejudice before hearing amounted to an election, for the reason that the complaint stated facts entitling the pleader to both the legal remedy of damages and the equitable remedy of rescission. The complaint prayed for damages, and plaintiff up to the very moment that the suit was dismissed, or, for that matter, any time before judgment, could have abandoned the case so far as rescission was concerned and relied solely upon the theory that she was entitled to the legal remedy in the shape of a money judgment in damages for deceit. That being so, how is it possible for defendants at this time to contend that

the commencing of that action in the State court amounted to an election of an inconsistent remedy, and in bar of the present action?

Under the State practice a plaintiff has control of his action up until the time that affirmative relief is asked by the defendant, and until that time he is entitled to dismiss his action without prejudice to the commencement of another action in the future. Assume that the complaint in the action in the State court had contended no facts entitling plaintiff to rescission, but had proceeded solely upon the theory of legal relief in damages; in that event defendant would not pretend to urge the State action as a bar to the present action. That is unquestionable.

Now, as the Court says by Van Fleet, Judge, in the case of *Hines v. Ward*, 121 Cal., at page 120, "The doctrine of election, as applied to a choice of remedies, which precludes a party from claiming repugnant rights, is but an extension of the general principles of equitable estoppel, and proceeds upon a like theory, that the inconsistent attitude of the party will put his adversary to some disadvantage." In other words, defendant is now seeking to invoke the principles of equitable estoppel to debar plaintiff in this action upon the ground that her action in filing this suit has put the defendants to some disadvantage. What disadvantage, may we ask, are defendants put to any more than they would have been put to had the complaint in the first instance prayed simply for damages, and had not contained any facts entitling plaintiff to rescission? It must

be remembered that in the State case, plaintiff, by the allegations in her complaint, was entitled to both the equitable remedy of rescission and the legal remedy of damages. The allegations of the complaint were sufficient for both remedies. It is impossible to draw a complaint stating a cause of action for rescission without at the same time stating a cause of action for damages in money. Defendants' answer alleges that said complaint prayed for \$35,000 damages. That being the case, wherein was there any election between the legal remedy and the equitable remedy of rescission? Up to the time the action was dismissed there had never been any demurrer or motion or request of any kind upon the part of defendants to compel plaintiff to elect upon which grounds she would stand, and there was never any action taken by the Court to compel plaintiff to elect between the two. And, as we understand the law in respect to the State practice, plaintiff could not be compelled to say, "I will try for rescission and waive damages, or I will try for damages and waive rescission." Defendants now seek "the general principles of equitable estoppel" to cast the plaintiff in this action out of court; yet in their answer to the complaint in the State case they alleged that plaintiff had never made any tender or offer to return certain parts of the property involved, and that she had sold a large portion of the property involved, and that she was in no position to prosecute an action for rescission, inasmuch as rescission was impossible. If, as the verified answer of defendants alleges, rescis-

sion was impossible, and that remedy was not within her reach, she would in that action have been relegated to her remaining right to money compensation in damages. If the allegations contained in defendants' answer are true, then at the time plaintiff dismissed her action in the State case without prejudice, she, as a matter of fact, did not have any case as far as rescission was concerned, and, not having any case so far as rescission is concerned, she could not possibly have made any election, for it is settled beyond any possibility of argument that where a person mistakenly attempts to pursue a remedy which he does not have, such attempt does not amount to an election. (*Barnsdall v. Waltdmeyer*, 142 Fed. 420.)

Defendants in their verified answer in the State case denied that plaintiff was entitled to rescission by reason of the impossibility of putting the parties back where they were. That denial was a denial of that remedy, and if that was true she had no choice as to rescission, and if she had no choice she could not make an election. Does that not estop defendants from now saying that she *did* have a choice and that she *did* exercise it?

Defendants at all times resisted plaintiff's efforts to secure a rescission, and after the notice of rescission was served upon defendants, and before the State action was commenced, to-wit, on March 12, 1912, the defendants served, in due form, a legal and technical notice upon plaintiff in which they resisted and refused plaintiff's offer of rescission, and in which notice they stated that they did not "recognize her

right or privilege of rescinding or attempting to rescind transactions which they had had with her, and therefore respectfully declined to accede to her demands or any of them." If defendants had accepted plaintiff's offer of rescission, or had in any way acted upon it, the situation might have been different, but they resisted her offers and attempts at every step. Under these circumstances, are they not estopped by the very principles of equity which they seek to invoke against the plaintiff? Assuming now, just for the sake of argument, that the remedy by rescission and the remedy in damages were, as a matter of fact, two totally separate, distinct and inconsistent remedies, and that the plaintiff in the State action, as a matter of fact, discarded the remedy of damages and elected the remedy of rescission, still if it should have developed in the trial of the case in the State court that, as a matter of actual fact, her right to the remedy of rescission was gone, by reason of laches, or impossibility of putting the parties back where they were, she would not then have been precluded in any court of her subsequently resorting to her legal right of damages for deceit.

Now, the point is this: Defendants at all times and in every way denied that plaintiff at that time had a right to rescind. In order to uphold their contention that plaintiff made an irrevocable choice in favor of her alleged inconsistent remedy of rescission, they must now switch their position and say that she *did* have a choice, and that she elected, because if she had no choice by all the authorities

she could not elect. At this time will not the very principles of equity which the defendants seek against the plaintiff estop them from alleging the existence of a right in possession of plaintiff at a former time, when they at that time denied the existence of that right? He who seeks equity must do equity, and are the defendants to be permitted to now violently change their position simply because it seems to serve their purpose so to do?

Assuming for the moment that the remedy by rescission and the remedy by damages were irreconcilable and inconsistent, who is going to say, or how can it be determined now, whether or not plaintiff had sufficient grounds for rescission? In other words, must that issue be thrashed out in this action?

We think that the foregoing argument is sufficient to satisfy the Court of the correctness of our position, but we will cite a few cases wherein the dicta at least is squarely in point, and we might mention that we defy counsel for the defendants to produce a single case in any jurisdiction upholding their contention, wherein the facts are on all fours with the case at bar.

We will commence with the California case of *Montgomery v. McLaury*, reported in 143 California at page 83. The facts in this case were:

A man by the name of Montgomery had a ranch in Minnesota. Two brothers, from southern California, by the name of McLaury, were in Minnesota, and while there induced Montgomery to trade his farm in Minnesota for a piece of orange land which

they owned in southern California. The exchange was effected, and, as the orange land was held to be several thousand dollars more valuable than the Minnesota farm, Montgomery, after he received the deed for the orange land from the McLaury brothers, gave them a mortgage back on the property for \$4,000. Montgomery then came west, and, after examining the property, which he had not seen before the trade, found that it was not as the McLaurys had represented it to be. He then brought an action in the State court to recover on the deal. His complaint, as the opinion states, was so framed and contained allegations sufficient to entitle the pleader to both the equitable remedy of rescission and the legal remedy of damages. The trial court rendered judgment equivalent to \$4,800 in damages—that is, it ordered the cancellation of the \$4,000 mortgage and awarded a money judgment for damages for \$800. The defendant, on the appeal, attacked the complaint on the theory that inasmuch as it prayed for two inconsistent remedies and proceeded upon two inconsistent theories—that is, damages and rescission—that it was fatally defective. In deciding the appeal the Supreme Court of California sustained the trial court and held that “the only question to be considered was whether the facts alleged in the complaint, and found by the Court upon sufficient evidence, would support the judgment.” This case is squarely in point, and a reading of this case will show conclusively that there could not possibly have been any election in the State case. The entire opinion is important, but,

owing to its length, we will only quote a few sentences, as follows:

"The only question now to be considered is whether the facts alleged in the complaint, and found by the Court on sufficient evidence, will support the judgment, for there is no such rigid and inexorable rule as to election of remedies in cases of fraud as that for which the appellants contend. It is undoubtedly true that when one who has been defrauded in a contract elects to affirm it after discovery of the full extent of the fraud, he cannot afterwards claim a rescission. This is simply a result flowing from the general doctrine of estoppel. But an election to disaffirm a contract induced by fraud, and an effort to obtain a rescission, will not, if resisted, and especially if rendered impossible or difficult or of doubtful advantage by the act of the guilty party, bar an action based upon a subsequent affirmation of the contract, and the commencement of such an action is in itself an affirmation."

*Montgomery v. McLaury*, 143 Cal. 88.

We will now quote from the case of *Wright v. Chandler*, 173 S. W. 1173, a Texas case decided February 10, 1915, in which the Court says:

"The trial court erred in striking out the prayer for damages, since the same could not have operated as a surprise, because the facts justifying same were pleaded and had been all the while. No proof was necessary to meet the same that was not already in the record. The price paid and evidence of market value, etc., had all been shown. For that matter, appellants were entitled to the benefit of the testimony as to damages under their prayer for general and special relief in law and equity. While the Wrights, under the jury's finding, had lost their

right to rescission, it does not necessarily follow that they had lost their right to damages. A party electing to sue for damages affirms the contract, and therefore loses his right to rescind the same, but it does not follow that, by suing for rescission, the right to damages is lost in case it becomes necessary to change the cause to an action for damages. When a party has a cause for damages it will last until limitation intervenes, but when he brings a suit for damages he thereby puts an impassable barrier between him and the right to rescind the contract."

*Wright v. Chandler* (Tex., 1915), 173 S. W. 1176.

We will now quote from the case of *Steinbach v. Murphy et al.*, 128 S. W. 207, a Missouri case, decided in 1910, wherein the Court says:

"The rule in this State is that when a party has two remedies, the commencement of a suit and its dismissal before final judgment does not amount to such an election as will prevent the party from pursuing the other remedy. This question was raised in the case of the *Anchor Milling Co. v. Walsh*, 20 Mo., App. 107, in the St. Louis Court of Appeals, which held the doctrine to be as above stated. This case was followed by the same court in the case of *Lapp v. Ryan*, 23 Mo. App. 436, and those cases were followed by the Supreme Court of this State in the case of *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615. In the case of *Johnson-Brinkman Commission Co. v. Missouri Pacific Railway Co.*, 52 Mo. App. 407, the Kansas City Court of Appeals took the contrary view and certified that case to the Supreme Court, for the reason that their decision was in conflict with the St. Louis Court of Appeals in the two

cases above cited. The Supreme Court in this case (126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675) reviews the authorities on that question, and, while it finds that the authorities are not uniform upon it, yet their conclusion in that case was that the weight of authority sustains the position which we have previously stated that in case a party may have two remedies for the same wrong, then the mere bringing of a suit which is dismissed and not prosecuted to final judgment is not such an election as will prevent the party from afterward pursuing the other remedy, and the doctrine therein announced may now be said to be the settled rule of law in this State upon this question. This being true, our conclusion is in this case that the mere bringing of the suit in the State of Kansas, which was dismissed without being prosecuted to final judgment, was not an election of remedies, and did not start the statute of limitations to running, and hence this action is not barred for that reason."

*Steinbach v. Murphy et al.* (Mo., 1910), 128 S. W. 208.

We will now quote the entire opinion in the case of *Dooley v. Crabtree*, 109 N. W. 889, an Iowa case, decided in 1906. We will quote the entire opinion, which is as follows:

Deemer, J.:

"The division of the answer which was attacked by the demurrer pleads in substance to the following facts: That defendant obtained from plaintiff certain real estate in exchange for mining stock; that thereafter plaintiff, claiming that his property had been obtained by fraud and false representations, undertook to rescind the exchange, and tendered defendant the stock received by him (plaintiff) and demanded a recon-

veyance of the real estate, stating that he elected to rescind the transaction; that defendant refused to accept the stock so tendered and refused to reconvey the real estate, and that thereupon plaintiff commenced an action in the District Court of Polk County to recover said real estate; that the allegations in that petition were substantially the same as those made in this case; that that action was prosecuted in said District Court and defendant was obliged to employ counsel to defend the suit, and was put to great expense in so doing. It is claimed that these facts constituted an election on the part of plaintiff to rescind the sale, and that plaintiff cannot now sue for damages on the theory that he suffered damages by reason of the exchange of properties. As part of this division of the answer, defendant set forth the judgment entry in the proceedings which, he alleged, constituted an election, from which it appears that during the trial of a case brought against the Gladiator Consolidated Gold Mine & Milling Co. and C. H. Crabtree, defendant's counsel claimed that there was a misjoinder of causes of action in that plaintiff therein had stated a separate cause of action against each of the defendants, and moved that the action be abated or dismissed, or, if this were denied, that plaintiff be required to elect as to which cause of action he would pursue. The motion was made on behalf of each party. Upon this motion the trial court held that there was a misjoinder of parties and causes of action in that the action was against the company alone, but the prayer was for judgment against both defendants, and ordered that plaintiff's petition be dismissed at his costs. It was very clear that this judgment was not a former adjudication nor a bar to plaintiff's present suit, except on the theory of an election of rights or remedies. There was no trial upon the merits, and no judgment entered save a dismissal of the case because of misjoinder of parties and causes of action. In-

deed, it is not contended in argument that the judgment in the original case amounted to such an adjudication as barred plaintiff of recovery in the present action. But it is argued that by filing the original petition for rescission, plaintiff elected to disaffirm the contract, and that he cannot now be heard to say the contract was good and recover damages for the breach thereof. It is insisted that when the alleged fraud was discovered, plaintiff had the option of rescinding the sale and recovering his property, or affirming the sale and recovering damages on account of the fraud practiced upon him, but that he could not do both, and that when he elected to pursue the one remedy he 'made his bed and must lie in it.' This is the exact question presented by the demurrer, as we understand it, although we might well refuse to consider it for the reason that most of the allegations in defendant's answer are mere conclusions of law, and none of the pleadings in the original case are set out.

"While the petition in this case is apparently to recover damages, it is nevertheless alleged that plaintiff tendered back to defendant the stock received by him, and demanded the return of the property given in exchange, and further alleges that the stock received by him was of no value whatever, but that the property given by him for the stock was worth \$6,000, and he asked judgment for \$6,000. It is by no means clear that this amounted to an affirmation of the sale. It might as well be said to be an action to recover back the value of the property received by defendant upon the theory that plaintiff had done all he could in the way of rescission, and that he was seeking to recover the value of his property upon the ground that there was no valid exchange. But, however this may be, plaintiff did not pursue his original action to a decree. It was dismissed for the reasons stated, and there was no attempt to adjudicate his rights in the

premises. The ruling of the trial court upon the motion to dismiss was not appealed from, and that ruling conclusively established the fact that plaintiff had mistaken his remedy or had so gone about it that he could not recover in the form of action adopted by him. Thereafter he brought this suit, and is met with the pleading already stated. That the doctrine of election of remedies does not apply is well settled by our own cases: *Tyler v. Bowen*, 124 Iowa 453, 100 N. W. 505; *Thorson v. Baker*, 107 Iowa 49, 77 N. W. 510; *Smith v. Bricker*, 86 Iowa 285, 53 N. W. 250. And that the doctrine of election of rights has no application is equally well established. *Lemon v. Sigourney Bank* (Iowa), 108 N. W. 104, and cases cited; *Zimmerman v. Robinson* (Iowa), 102 N. W. 814. The cases already cited clearly rule this one and satisfactorily point out the distinction to be observed between such as these and those relied upon by appellant.

"It would be useless to further consider a matter already so fully covered by the cases cited.

"Our conclusion is that the ruling upon the demurrer was correct, and it is affirmed."

*Dooley v. Crabtree* (Iowa, 1906), 109 N. W. 889.

In the case of *Wright v. Ritterman*, 4 Robt. 704, 1 Abb. Pr. N. S. 428, it was held by the Superior Court of the City of New York:

"That the pendency of an action on a contract for goods sold and delivered will not prevent the bringing of an action for the conversion of the same goods; that the plaintiff may have two remedies in such a case, and an adjudication brought to obtain either, whether for or against him, may be a bar to the other, but at any time previous to such an adjudication he may discontinue the first action and proceed with the second.

"Something more than the mere bringing of a suit is necessary to make the election final and conclusive, and to constitute it the act must be a clear and affirmative one, changing the relations of the parties to the subject matter, and which the party making the election cannot retrace without the other's consent. *Deens v. Dunklin*, 33 Ala. 47; *Bennett v. Goldthwait*, 109 Mass. 494."

We will now quote from the case of *Johnson-Brinkman Commission Co. v. Missouri Pacific R. Co.*, 26 L. R. A. 840, wherein the Court says:

"The question then arises, How was it, or by whom was it, to be determined that the plaintiff herein mistook his remedy, in bringing the attachment suit? It will not be contended, we presume, that after it had been instituted, and although plaintiff's attorney had become fully satisfied that the action had been improvidently brought, yet it was necessary, in order to save to his client the right to sue in replevin, that he should, at his expense, prosecute the case to final judgment, in order to settle that question. Nor do we for one moment, suppose that that issue could be tried in this controversy. It necessarily follows that plaintiff must have determined for himself, upon the advice of his attorney—just as he did do—whether he would proceed with the attachment suit to final judgment or not, and, having determined to dismiss it, that he was not, by reason of having instituted it, estopped from bringing this action. We are aware that it was otherwise held in *O'Bryan v. Glenn*, 91 Tenn. 106, but that case seems to be so inconsistent with reason and justice that we must decline to give it our approval. The authorities which hold that a person having two inconsistent remedies, and electing to pursue one, cannot thereafter pursue the other, do so upon the ground of election, or

as most courts put it, estoppel. As was said in *Anchor Mill Co. v. Walsh*, *supra*, 'There is no element of estoppel in the case. There is no estoppel by record. for the attachment suit has not been prosecuted to judgment. There is not estoppel *in pais*, for the defendant has not taken such action, in consequence of the suing out of the attachment, that he will receive detriment, in a legal sense, from the conduct of the plaintiff in changing his position, and pursuing a different remedy. There were no intervening rights in this case from the time of suing out the attachment until that suit was dismissed, nor is it claimed that the defendant therein was by reason thereof induced to change his position with respect of the wheat in controversy. 'Estoppel *in pais* may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Bigelow, Estoppel, 4th ed. 445. The attachment suit was brought hastily, and without time, as appears from the record, for the attorneys who brought it to investigate the facts in the case, who, after having done so, came to the conclusion that it was improvidently brought, and dismissed it; and to hold, under such circumstances, that plaintiff is estopped by his election in that case from prosecuting this, in the absence of intervening rights, injury or change of position by anybody by reason thereof, would be, we think, invoking a harsh and very unjust rule. But aside from any misconception as to the institution of the attachment suit, as it was dismissed before judgment, before the rights of others had intervened, and as the defendant therein was in no way injured in consequence thereof, we are not inclined to hold that plaintiff is, by reason of the institution of that suit, estopped from prosecuting this. *Anchor Mill Co. v. Walsh*, *Lapp v. Ryan*, and *Johnson-Brinkman*

*Commission Co. v. Central Bank of Kansas City, supra.*"

*Johnson-Brinkman Commission Co. v. Missouri Pacific R. Co.*, 26 L. R. A. 842.

We will now quote from the case of *Glover v. Radford*, 79 N. W. 803. The facts of this case were as follows:

The plaintiff purchased part interest in a corporation, and claims to have been induced to purchase this stock by misrepresentations of defendants as to the earning capacity of the corporation. Plaintiff did not discover the fraud until a short time prior to the commencement of this action. He then sought to rescind but his offer was refused. He then brought this action joining counts based upon rescission and upon breach of the contract. The court held that the counts were inconsistent and required the plaintiff to elect which theory he would stand upon, and counsel chose rescission, taking exception to the ruling.

At page 804, the court says:

"There can be no doubt that the two theories were inconsistent in a sense, because one is based upon the continuation of the contract and the other upon its rescission. The plaintiff attempted to rescind by tendering the stock and demanding the money that he paid for it. If there was fraud, he had the right to do this, provided he had not waived it and could put the defendants in *statu quo*. But he took the chance of being unable to convince the court and jury that he had not waived his right to rescind, and, if he should fail in this, he could not recover if he relied upon the single count, although the jury might find that he had been defrauded. If there was fraud,

and he did not succeed in rescinding the contract, he certainly ought to have the right to recover damages for the injury he had suffered, if any. Had defendants consented to rescission, and acted upon it, the case would have been different, for there might then have been an estoppel; but there is nothing in the nature of an estoppel here. We have frequently held that one is bound by his choice between inconsistent rights or remedies; but, where there is no estoppel, this cannot usually be, unless the person really had a right of election. In this case the plaintiff claimed that he had a right to rescind, and tried to rescind, but he did not succeed, either because he really had no such right, or because he failed to seasonably assert it. He supposed that he had a remedy growing out of rescission, but it turned out that he was mistaken, and this left him the right to recover for the fraud, if there was fraud. This subject was discussed in *McLaughlin v. Austin*, 104 Mich. 491, 62 N. W. 719; *Chaddock v. Tabor* (Mich.), 72 N. W. 1095; *Sullivan v. Ross Estate* (Mich.), 76 N. W. 310. It is a common practice to permit the joining of counts which state the cause of action differently, to prevent a possible variance between the declaration and the proof. The plaintiff should not have been required to elect between the counts of his declaration. The case being tried upon the theory of rescission, it was competent for the plaintiff to offer testimony to explain the delay in commencing the suit and excusing laches. The testimony of Mr. Combs was offered for that purpose. Being excluded, we cannot tell whether it would have sustained the claim of counsel or not, but we think that he should have been permitted to introduce such proof. We think a discussion of other questions raised unnecessary. The judgment is reversed, and a new trial ordered. The other justices concurred."

*Glover v. Radford et al.* (Mich. 1899), 79 N. W. 803.

We will now quote from the case of *First Nat. Bank v. Geo. R. Barse Live Stock Commission Co.*, 64 N. E. 1098, wherein the Court says:

"The answer of both parties admitted the commencement of said attachment suit, and its dismissal without prejudice on the date named in the bill, and the evidence shows that the suit was dismissed on the stipulation of the parties thereto. We are of the opinion the mere bringing of the attachment suit by the Barse Company, which suit did not proceed to judgment, but was dismissed upon written stipulation without prejudice, did not constitute an election, nor estop the Barse Company from setting up its claim to the fund in this case. In *Gibbs v. Jones*, 46 Ill. 319, it was held that, when an action of trover is brought, an action in *assumpsit* between the same parties, brought to recover the value of the property, and which was dismissed without prejudice, cannot be specially pleaded in bar of the action of trover. And in *Flower v. Brumbach*, 131 Ill. 646, 23 N. E. 335, it was said: 'The circumstance of a party having elected one of several remedies by action will not, in general, preclude him from abandoning such suit; and, after having duly discontinued it, he may adopt any other remedy.' To the same effect are *Stier v. Harms*, 154 Ill. 476, 40 N. E. 296, and *Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803. In *Johnson-Brinkman Commission Co. v. Missouri Pac. Ry. Co.*, 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675, it was held that an attachment suit brought by a vendor of personal property against his vendee, if dismissed before final judgment, does not estop him from subsequently maintaining an action of replevin to recover the chattels, in the absence of an intervening right, injury, or change of position by reason of the attachment. The word 'election,' as applied to remedies, is but another term for 'estoppel.' There is no element

of estoppel by record, as the attachment suit was not prosecuted to judgment; and there is no estoppel *in pais*, for neither Wootters nor the bank has taken such action, in consequence of the suing out of the attachment, that they will receive detriment, in a legal sense, from the conduct of plaintiff. There were no intervening rights in the case from the time of suing out the attachment until suit was dismissed. Nor does it appear that the bank was, by reason of the commencement of said suit, induced to change its position with respect to the fund in controversy. If the attachment suit had proceeded to judgment, or there were intervening rights, or the position of the parties, by reason of the commencement of the suit, had been changed, a different question would be presented; but it having been dismissed upon the written stipulation of all the parties, without prejudice to the rights of any of them, all are in the same position they would have been if the suit had never been begun."

*First Nat. Bank v. Geo. R. Barse Live Stock Commission Co.* (Ill., 1902), 64 N. E. 1097.

In the case of *Jones v. Magoon*, 138 N. W. 686, the Court held:

"An attempted rescission by serving notice of intent to rescind and offering back, which was refused by defendant, is not a bar to a subsequent action for damages."

In the case of *Otto v. Young* (Mo., 1910), 127 S. W. 9, it was held by the Court:

"Mere institution of suit of damages which was dismissed before judgment was not a bar for specific performance."

We will now quote from the case of *Rankin v. Tygard*, 198 Fed. 795, wherein the Court says:

"When a wrong has been perpetrated and the victim is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one, and, in the absence of facts creating an equitable estoppel, his prosecution of the wrong remedy to a judgment of defeat, will not estop him from subsequently pursuing the right one to victory."

*Rankin v. Tygard*, 198 Fed. 806.

We will now quote from the case of *Spurr et al. v. Home Ins. Co.*, 42 N. W. 206, wherein the Court says:

"This is an action to reform a policy of insurance, and to recover upon the same as reformed. It is urged on the part of the respondent that the plaintiffs cannot maintain this action, because prior to its commencement they had commenced an action to recover upon the policy now sought to be reformed. The doctrine of election as between inconsistent remedies is relied upon. We think that the conclusion of the learned judge of the district court, adverse to the respondent, was correct. The former action was dismissed without any final determination. The findings of the court in this case do not disclose clearly the circumstances attending the dismissal of the former action, nor are they otherwise shown in this record. It may be inferred, however, that the dismissal, which was upon the plaintiffs' motion after trial had commenced, was because, having commenced the action upon the theory that the proper legal construction of the policy without reformation was such as the plaintiffs now claim the agreement to have been, and such as entitled the plaintiffs to the recovery sought, they found themselves unable to recover upon the very different construction which the court put upon the policy. If such were the case, the proper remedy having been misconceived merely by reason of the failure of the plaintiffs to correctly apprehend the

legal construction of the written instrument, which was supposed to embody their agreement, and no advantage, benefit, or remedy having been secured by means of that action, nor the adverse party prejudiced, and that action having been dismissed without a determination of the merits, the plaintiffs were not precluded from maintaining this action. *Bitzer v. Bobo*, 38 N. W. Rep. 609; *Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. Rep. 216, and 22 N. W. Rep. 588; *Butler v. Hildreth*, 5 Metc. 49, 52; *Peters v. Ballistier*, 3 Pick. 495, 505; *Railway Co. v. Swinney*, 91 Ind. 399; *Bigelow, Estop.* (4th ed.) 692; *Thayer v. Arnold*, 32 Mich. 336, 341; *Brewster v. Striker*, 2 N. Y. 19. In *Thomas v. Joslin*, 36 Minn. 1, 29 N. W. Rep. 344, the former action had proceeded to a judgment for the defendant on the merits. It is said in the opinion, with reference to the right of the plaintiff to maintain the subsequent action for reformation, that 'in such cases the plaintiff should take a dismissal in the nature of a nonsuit, before final submission on the merits'."

*Spurr et al. v. Home Ins. Co.* (Minn., 1889), 42 N. W. 206.

We will now quote from the case of *Vail v. Reynolds* (N. Y., 1890), 23 N. E. 303, wherein the Court says:

"He may also bring an action in equity to rescind the contract, and in that action have full relief. *Allerton v. Allerton*, 50 N. Y. 670. Such an action is not founded upon a rescission, but is *maintained for a rescission*, and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received, and make tender of it on the trial."

*Vail v. Reynolds*, 23 N. E. 303 (N. Y., 1890).

We will now quote from the case of *Houston Mer-*

*cantile Co. v. Powell & King*, 130 N. Y. S. 274, wherein the Court says:

"This proceeding was brought to dispossess the defendants (tenants). The real defense lies in a counterclaim for damages for fraudulent representations of plaintiff, inducing defendants to make the lease.

"At the opening of the trial there was introduced in evidence the summons and complaint in an action brought in the Supreme Court by the present defendants against the plaintiff (landlord) setting up fraudulent representations of the landlord coincident with the making of the lease in question, and asking that the lease be annulled, declared void, and set aside, and that the tenants have judgment for the amounts already paid by them and their damages, which are set out in detail. Thereupon there ensued a colloquy between counsel and the court, in which the points presented are far from clear. Plaintiff's counsel urged that the bringing of the action in the Supreme Court (which was instituted after the commencement of the summary proceedings and before the defendants' answer therein had been interposed) constituted an election on the part of the defendants (tenants) in this action to rescind the lease, and that such conduct concluded them from maintaining their counterclaim (under Code Civ. Proc., sec. 2244) in the present action, because the suit in equity necessarily involved the contention on the part of the defendants that the lease was at an end. If this were correct, the question whether the rent had been paid would become immaterial; it being, of course, conceded by defendants that the rent was not being paid. In other words, if the lease were at an end the plaintiff would be entitled to possession.

"The learned trial judge decided that the action in the Supreme Court constituted an 'election' on the part of the tenants to rescind the lease. He

gave judgment for the plaintiff, restoring possession of the premises to it. It must be noted, however, that the Supreme Court action was not one at law for return of the money paid by the tenants, proceeding on the theory that the lease *had already been rescinded*, but was an action in equity *praying for an adjudication declaring* the lease to be annulled and asking for a return of money paid and for damages. The bringing of such an action does not constitute an *election* to rescind, in the sense in which the doctrine of inconsistent remedies is applied. The election with which the courts are usually concerned consists of a choice of inconsistent remedies as between suing on tort or in contract in case of conversion (see *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803), or the bringing of an action for replevin as opposed to a subsequent action to recover the purchase price (*Morris v. Rexford*, 18 N. Y. 552), or choosing between an action based on affirmance and one based on rescission of a contract or of a contractual transaction (see *Droege v. Ahrens Mfg. Co.*, 163 N. Y. 466, 470, 57 N. E. 747). In all these cases it will be observed that the actual present mental attitude conclusively evidenced by the bringing of one action, is inconsistent with the different attitude necessary to sustain the other. The principle would apply in the case at bar, if the tenants had actually rescinded and brought an action at law for the money previously paid by them. By bringing their action in equity, however, they have merely evidenced an intention to ask a court of equity to declare the lease annulled.

"In the leading case of *Gould v. Cayuga National Bank*, 86 N. Y. 75, 83, where the three courses open to a person who has been induced to enter into a contract by fraud are clearly defined, the character of the action brought by the defendants in the case at bar is significantly described as follows:

“ ‘He may bring an action in equity to rescind the contract, and in that action he may have full relief. Such an action does not proceed *as upon* a rescission, but proceeds *for* a rescission.’ ”

“See, also, *Vail v. Reynolds*, 118 N. Y. 297, 302, 23 N. E. 301.

“There are some expressions—rather *obiter* in their way—in some cases from which some doubt as to the correctness of this position might be derived; but that could only be as the result of straining the meaning of the court. See *Roberge v. Wynne*, 144 N. Y. 709, 712, 39 N. E. 631, an opinion in which it is stated that the majority of the court did not concur; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 420, 73 C. C. A. 515; *Koke v. Balkan*, 15 App. Div. 415, 417, 44 N. Y. Supp. 426. In the case last mentioned an unsuccessful suit in equity of the kind involved in the case at bar is spoken of as a ‘futile *attempt* to set aside a transaction.’ In *Bracken v. Atlantic Trust Co.*, 167 N. Y. 510, 60 N. E. 772, 82 Am. St. Rep. 731, an action in equity *prosecuted to decree*, requiring the delivery of certain stock to plaintiff, was held to constitute a bar to an action at law on the same cause of action for damages for violation of defendant’s duty to sell and apply the proceeds of the same stock. It may well be that the setting up of the defense of fraud as a counterclaim in the present action may—indeed, probably will—require a denial of relief in the action in equity, if the latter be continued. *Morris v. Rexford*, *supra*, at page 558 of 18 N. Y. See, also, *Woods v. Garcewich*, 67 App. Div. 53, 57, 73 N. Y. Supp. 472. I believe, therefore, that the learned trial judge was in error in holding that the bringing of the action in equity constituted an election to treat the lease as rescinded as a present fact.”

*Houston Mercantile Co. v. Powell & King*,  
130 N. Y. S. 275, 276.

We will now quote from the case of *Union Cent. Life Ins. Co. v. Drake*, 214 Fed. 536, wherein the Court says:

“\* \* \* And third, because of the controlling rule in cases of the class to which this suit belongs is that even where the victim of a wrong has inconsistent remedies, and he is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating an equitable estoppel, and there are none in this case, his prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one to victory.”

*Union Cent. Life Ins. Co. v. Drake*, 214 Fed. 548.

We will now quote from the case of *Marshall v. Gilman*, 53 N. W. 811, wherein the Court says:

“The former action for rescission does not preclude the plaintiff from recovering damages in this action for a breach of the representations and warranty. In the former case it was decided that the right to rescind, which right must be exercised promptly, if at all, had been lost by a failure of the plaintiff to seasonably avail himself of it, and by conduct respecting the property inconsistent with an intention to exercise that right and amounting to an election not to do so. But the prosecution of that action without avail did not preclude resort to the remedy here sought. The former action did not involve a determination of the right of action now relied upon, nor is there any such inconsistency between the two actions that by resorting to the former, the plaintiff can now be deemed to have lost, by force of the doctrine of election, the right to maintain this action.  
\* \* \* The mere fact that the plaintiff, after he had lost the right to rescind, sought in vain

to avail himself of that remedy by action, should not bar his right to recover damages on the contract."

*Marshall v. Gilman* (Minn., 1892), 53 N. W. 811.

We will now quote from the case of *In re Van Norman*, 43 N. W. 334, in which the Court says:

"A mere attempt to claim a right or pursue a remedy to which a party is not entitled, and without obtaining any legal satisfaction thereupon, will not deprive him of the benefit of a right or remedy which he originally had a right to claim or resort to. The doctrine of election between inconsistent rights or remedies has no application to such a case."

*In re Van Norman* (Minn., 1889), 43 N. W. 334.

We will now quote from the case of *Barnsdall v. Waltemeyer*, 142 Fed. 415, wherein the Court says at page 420:

"The fifth defense was that the plaintiff brought a suit in equity against the defendant in the court below to rescind the agreement which the plaintiff is seeking to enforce in this action for the misrepresentation and fraud of the defendant and for his failure to perform his part of the contract, and that that suit was, on August 3, 1903, dismissed upon its merits. It is contended that by the institution and prosecution of this suit in equity the plaintiff irrevocably elected to rescind the contract, and thereby estopped himself from maintaining this action to enforce it. But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence is no defense

to an action to enforce an actual remedy inconsistent with that first invoked through mistake." (Citing many cases.)

*Barnsdall v. Waltemeyer*, 142 Fed. 415.

Respectfully submitted,

LLOYD MACOMBER,

*Attorney for Plaintiff in Error.*

Ground State  
NYS  
186



(Indorsed:)  
No. 18701  
Garwood vs. Schreiber,  
Defts. Exhibit No. 3  
(N) Clerk.





No. 2924.

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—IN THE—

**United States Circuit  
Court of Appeals**

—FOR THE—

**Ninth Circuit**

ISABELLE GARWOOD,  
*Plaintiff in Error,*

*vs.*

JOSEPH SCHEIBER and MORRIS  
SCHEIBER and JOHN SCHEI-  
BER,

*Defendants in Error.*

---

**BRIEF ON BEHALF OF DEFENDANTS  
IN ERROR**

By A. H. HEWITT.

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*Filed this ..... day of March, A. D. 1917.*

FRANK D. MONCKTON, Clerk.

By ....., Deputy Clerk.

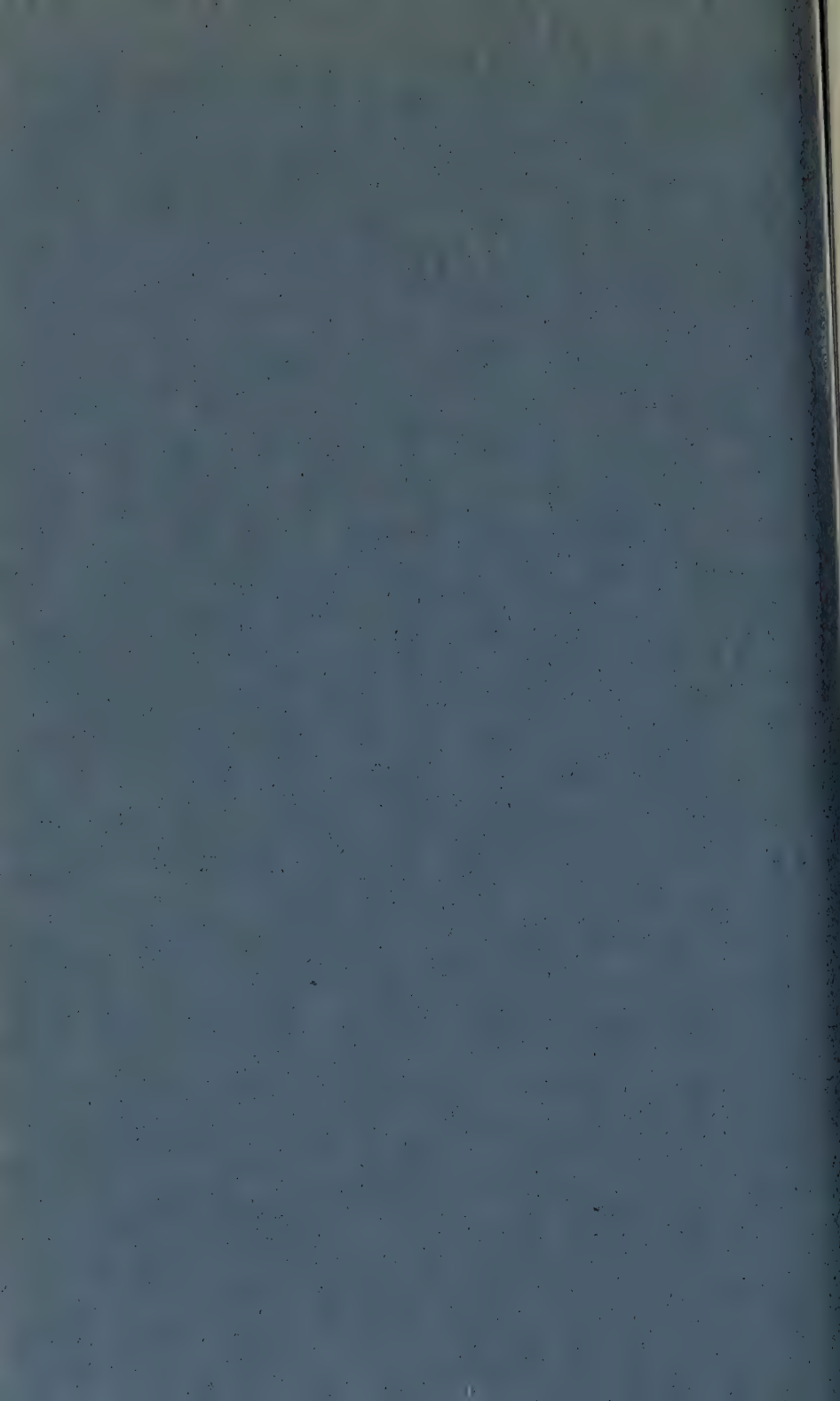
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**Filed**

MAR 5 - 1917

F. D. Monckton,



No. 2924.

—IN THE—

# United States Circuit Court of Appeals

—FOR THE—

## Ninth Circuit

ISABELLE GARWOOD,  
*Plaintiff in Error,*

*vs.*

JOSEPH SCHEIBER and MORRIS  
SCHEIBER and JOHN SCHEI-  
BER,

*Defendants in Error.*

### Brief on Behalf of Defendants In Error

#### STATEMENT OF THE CASE.

The statement of the case as contained in the brief of counsel for plaintiff is controverted in many particulars by the defendants, and it is quite fitting that we should give to the court a concise statement of the facts as they appear from the record.

In September, 1911, the defendants were the owners of the ranch in Sutter County, commonly known as the "Allgier Ranch."

It and the personal property on the same was for sale. No contract in writing for the sale of the property was signed by the owners thereof until the 27th day of September, 1911. This contract was for the sale of the personal and real property, and the contract appears in full in the answer of the defendants (Tr. p. 34.) Some months prior to this date a contract had been entered into between the owners of the property and the Colonization Company, but it had expired and was not renewed. The purchase price of the personal property was \$21,609.00 and of the real property \$75,000.00. This contract of sale and purchase was made directly with the owners of the property and not by any agents of defendants. It does not appear from the record that any agents of defendants had any power to bind them. In fact just the contrary appears from the receipt the Colonization Company gave to Miss Garwood when she paid the deposit money (Dfts. Ex. b.) The receipt on its face shows that it was subject to the approval of the owners of the property.

The ranch was sold as a whole and not by the acre. There was no shortage in acreage. The farm actually contained 609.9 acres. It was bought by plaintiff after a personal examination. The evidence shows that she and her agent were on the place looking it over and inspecting it at least three times prior to the purchase. No fraud or deception was practiced by defendants or by any one else in their behalf. The plaintiff ob-

tained value received for her money. It is true that there was some conflict in the evidence but the finding on this conflict was against plaintiff and the judgment of the trial court must stand unless error was committed.

### ARGUMENT OF DEFENDANTS.

The specification of errors as made by plaintiff and as argued by her counsel are so closely related they may be properly discussed together.

It seems that the chief complaint is made on the theory that the judgment is unsupported by the evidence. On this point evidently counsel can see no evidence except that of plaintiff. We think that he will concede that if the land was sold as a whole instead of by the acre that about nine-tenths of his brief is inapplicable. In discussing this case we are going to quote largely from the brief that we filed with the trial court, for in that brief every one of the points made by plaintiff was discussed. Before proceeding, however, we wish to call the attention of this court to the fact that all the evidence contained in the transcript from the bottom of page 336 was taken before a Commissioner and no rulings have been made on any of the objections of defendants to the testimony of plaintiff that should have been presented in chief. No request was made by plaintiff to reopen the case and for that reason we affirm that the testimony offered by her following page 399 of the transcript should not be considered.

In an action of this character it is essential that the plaintiff show by *clear and decisive proof* the existence of *six distinct elements* before she is entitled to recover, and these six elements, *each*

and all of which must be so established, are the following:

I. That the defendants have made a representation or representations in regard to a *material fact*.

II. That such representations were false.

III. That such representations were not actually believed by the defendants, on reasonable grounds to be true.

IV. That they were made with intent that they should be acted on.

V. That such representations were acted on by the plaintiff and in so acting on them she was ignorant of their falsity and reasonably believed them to be true.

VI. That she acted on these representations to her damage.

The *Supreme Court of the United States* in a case arising in California, to-wit:

*Southern Development Co. vs. Silva*, 125  
United States, 250,

laid down the above requirements in cases of this character.

The case has been affirmed frequently by later decisions of the United States Supreme Court.

See

*Farnsworth vs. Duffner*, 142 United States,  
43;

*Shappiris vs. Goldberg*, 192 United States,  
232-40,

and was adopted as the law of this State in the case of

*Oppenheimer vs. Clunie*, 142 Cal. 313-318,

and reiterated in an action for damages for alleged fraudulent representations in connection with a transfer of real property in the case of

*Maxon-Nowlin Co. vs. Norwing*, 166 Cal, 509-510,

where many other California cases sustaining the above principles are cited with approval.

We will discuss the case in the order in which the above principles are stated and the additional ground covered by our brief will be:

## VII.

*That the plaintiff elected to rescind and is bound by that election.*

### I.

Did the defendants make representations in regard to material facts?

The plaintiff presents in her original complaint certain representations which she claims were false and known to be false, and upon which she alleges she relied. It is necessary for her to prove these by clear and convincing testimony, or, as the Supreme Court of the United States says, "by clear and decisive proof." We will take them up in their order: (a) That Morris Scheiber pointed out the boundaries of said land as follows:

That he pointed to the levee on the East bank of the Feather River and called plaintiff's attention to the same and stated that the western

boundary of said ranch ran along said levee Northward to a point near a white house, and from there eastward along a certain fence which he indicated to a point beyond a grove of oak trees, which he also indicated, and from there in a general southerly direction; and thence at right angles back in a westerly direction to the levee on the river bank; that the expanse which he indicated and showed to plaintiff was clear and level land, and said defendant, Morris Scheiber, then and there represented to plaintiff that said six hundred acres were all clear, level land identically the same as that directly about them where they stood; that said defendants and defendants' agents in dealing with plaintiff and enticing plaintiff to purchase said land at all times represented to plaintiff that said place contained six hundred acres of clear arable land \* \* \* \*

Counsel for plaintiff has devoted pages of his brief to the assumption that it was represented that the place contained exactly 600 acres; that, in fact, it did not contain 600 acres; that the sale was by the acre and that, therefore, plaintiff is entitled to damages for the difference in acreage.

Counsel seems to have entirely misconceived the allegations of the complaint and the facts in the case. As a matter of fact, the plaintiff was sold 600 acres of land, more or less, and she actually obtained 609.9 acres, and her title to the 609.9 acres has been perfected and she is the owner thereof, basing her ownership upon the Deed from the defendants. Therefore, plaintiff's voluminous brief in the case covering this point is of no particular benefit.

The point involved and the claim of plaintiff is, and what we have to meet is, the allegation and contention that the defendant Morris Scheiber (or for that matter any other defendants, though Morris Scheiber is alleged as the one who did so) pointed out the land by description set forth in lines 17 to 33 on Page 4 of the Complaint (Tr. p. 6), and represented the boundaries as stated in the Complaint and falsely stated then and there that there were 600 acres of all clear level land identically the same as that directly about them where they stood.

The evidence is conclusive that there were more than 600 acres. The question is: Did the defendants represent the *boundaries as stated and did they represent that the land was all clear and level land exactly like that directly about them—that is, about where they stood.*

It is apparent at once from the testimony of the plaintiff herself and of all the witnesses in the case that no such representation was ever made.

The question whether or not she believed or acted upon such representations will be discussed in subdivisions V and VI of this brief.

The question then is as to what was represented in reference to the boundaries and the land being clear and level land.

The Court, of course, will bear in mind that in an action for deceit it is not a question whether or not the plaintiff may have reached certain erroneous conclusions from what was said to her or from her misinterpreting what was said. That is not the gist of an action for deceit. The rep-

representations must actually be made and they must actually be false and they must actually be known to be false or such as should have been known to be false and they must have been made falsely with the intent to deceive, and the plaintiff must have believed the false representations and must have actually relied thereon to her damage, and the burden is upon the plaintiff to prove by clear and decisive evidence each and all of the various elements necessary to establish her cause of action.

The plaintiff admits that the boundaries of the land were actually pointed out to her the next day after the land was first called to her attention; that she actually was on the premises and saw with her own eyes the conditions there existing.

Now what does she say under oath that the defendant or defendants told her about the boundaries?

On Page 169 of the Transcript we find Miss Garwood saying: "Well, *I had no idea* of buying the ranch. I was trying to *entertain them*, and I said 'where is this land?' and they pointed at the levee and they said '*along that green line*' \* \* \*"

Q. Do you remember which one of the brothers that was?

A. I think it was *Morris, the little one*. Right along that *green line* to the white house. And I said '*what green line*' and they made it *more explicit* and they said '*down that fence* to those trees and across those trees, from the lower fence up to that grove.' *That is the only description I ever heard of the property in my life.*"

We have then these words according to plaintiff's own testimony as the representation made by one of the defendants namely, *Morris, the little one* (and, by the way, Morris is the little one).

Here is the language freed from conclusions:

“Where is the land?” And they pointed at the levee (meaning in the direction of the levee as what they said clearly shows) and said “Along that green line.” (The proof shows later that the levee was not green, but that the trees beyond were green) “Right along that green line to the white house,” And I said “What green line?” and they made it more explicit and they said “Down that fence *to those trees and across those trees*” (and) “from the lower fence up to that grove.”

The description referred to by plaintiff is of the westerly or Feather River boundary and the Feather River is across those green trees. Thus, according to plaintiff's own sworn testimony of the representations when she asked *what green line he referred to*, the defendant did not say that it was the “levee,” nor did he anywhere in this representation use the word “levee.” When she asked him what green line she says he made it more explicit and said “*down that fence to those green trees and across those trees.*” This is exactly what the defendants did represent to her and it was the truth and nothing but the truth, though they were even more explicit and in fact they added to what she admits: “to the old Feather River and along the river to a point near the white house, etc.”

That something was said about the river being

the boundary and that plaintiff thought that the line went to the river is made absolutely clear by her own testimony found on Page 170:

Q. Did you know what river lay behind that levee?

A. *I thought it was the Sacramento.* I thought that was the same levee I had been on before.

Thus, according to plaintiff's own testimony there was absolutely no misrepresentation as to the alleged misrepresented boundary. It may be possible that she thought the river was closer than it was and thus may have reached a wrong conclusion in her own thoughts, but this is an action based on deceit, and instead of the representation alleged in the complaint that the defendants said the levee was the line, her own testimony is to the contrary.

It will be noted on page 169 of the Transcript that plaintiff said that this is the only description she ever heard of the property in her life. Since the description given by plaintiff referred only to the westerly or Feather River boundary, it is quite apparent that she did hear further descriptions, so we find plaintiff positively mistaken, to say the least, in this assertion, but we do find, nevertheless, from the sworn testimony of the plaintiff herself that there was no misrepresentation of the one line that is in question. Defendants' exhibit I is a rough map of the property, and according to plaintiff's own statement of what the defendants told her was this western boundary they described it with absolute accuracy. When he said "Along that green line to the white house" she asked him what green line he

referred to. He did not answer that it was the levee, nor did he in any part of this alleged representation use the word "levee." In answer to her question she says: "They made it more explicit and they said 'Down that fence to those trees and *across those trees*' "

In making this statement of the line defendants represented to her the exact truth, but they were even more explicit than she says and in fact their representation continued after "*across those trees*" as follows: ".*to the old Feather River and along the river to a point near the white house, etc.*" That there was something said at that time about the river being the boundary and that the plaintiff then and there thought that the line went to the river is made perfectly clear by her own testimony found on the middle of page 170 of the Transcript.

Question by Macomber:

Q. Did you know what river lay behind that levee?

A. *I thought it was the Sacramento. I thought that was the same levee I had been on before.*

Thus, according to plaintiff's own testimony there was absolutely no misrepresentation as to this boundary, which is the only one in question.

It may be that plaintiff thought the river was closer than it was and that she did reach a wrong conclusion in her own thoughts as to how far *to the trees and across the trees* would mean. But the trees were beyond the levee, and she could see them. And the fact that the line went across the trees was, according to her own testi-

mony, clearly stated to her. The fact that she reached a wrong conclusion, if she did, would preclude a recovery in an action for deceit.

The allegations in the complaint that the defendants pointed out the levee as the western boundary is disproved by the plaintiff herself.

Now, bearing in mind that the plaintiff has only described the Western boundary and that she must have asked something about the other boundaries, it is quite apparent that her recollection on the subject, to say the least, is extremely indefinite and uncertain.

We would not discuss this question further if it were not for the fact that it is connected with the representation that all the land was clear and level the same as that about which they stood. On the face of the physical facts as they existed and as they were pointed out to the plaintiff, this would be so manifestly untrue that no sane man would have made the statement as plaintiff alleges it was made, nor would any sane woman have believed it if had been made. How could the land all be clear with the entire west line covered by trees?

It is, therefore, certain that if any conversation occurred from which the plaintiff might have inferred that any of the defendants represented that the land was clear and level, neither she nor they were referring to the land across the levee, is absolutely apparent from the physical facts and from the position of the parties and from the conversation that they were having.

It is, therefore, manifest that if any of the defendants used any such expression at all it

arose in the following manner, or in some similar manner, thus: After asking for the boundaries and having the defendant be more specific about the line going across to the trees and beyond the trees she turned to him and asked how many acres were in alfalfa and he said there were 250 acres, but 50 acres were drowned out when the levee broke, then she followed this up with the question: Is it all clear and level like this? and the answer would be yes. Or, possibly, after turning from the west boundary first to the alfalfa land itself and then to the back land asking about its condition she would say: Is it all clear and level like this? and the defendant may have answered yes, for while there are some swales running through the land, no contention is made that this representation was a misrepresentation in reference to that. The intent is to apply this representation to the land across the levee. We do not believe that the defendants ever represented that any of the land was clear and level, but had they done so it would have been truthful, and they are not responsible for any errors in plaintiff's conclusion, nor in any of her efforts to contort their honest statements into false representations.

Referring again to the alleged representations made to her as to the boundaries of the property, we find that John Scheiber on Page 378 testified that he clearly pointed out the lines; that they could see the timber across the levee from where they stood; that she asked him what the land out there, meaning beyond the levee, was good for, and he said it was good for wood.

She did not remember having any conversation

with him about it. She thought Morris was the one who pointed out the boundaries. As a matter of fact, Morris, in Joe's presence, pointed out the boundaries while they were down at the old barn near the levee. See Page 347:

Q. Did you tell her what the boundaries were?

A. Yes.

Q. What did you tell her the boundaries were?

A. I told her the boundary there along Claus Peters run, the south line from the Nicolaus Ranch, between Claus Peters and the Nicolaus Ranch run—I pointed over toward the levee, across the levee, over to the old Feather River.

Q. The old Feather River? A. Yes.

Q. Did you mention the fact that the river was one of the boundaries of the place? A. Yes.

The next question relates to pointing out the north boundary, which the parties could not see from where they were standing, but he told her where it ran. See page 347 of the Transcript.

At the middle of Page 349 the witness testifies in answer to the question 'What was the condition of the levees in September, was grass growing on it or was it dry?' A. No. in the fall usually the levee is pretty dry there; there is no grass growing on the levee there.

Q. All dead grass? A. All dead grass and dust on it.

Q. Was there any green land there to be seen?

A. The trees.

Q. That is over on the other side of the levee?

A. Over the other side of the levee.

Q. They could be seen to extend quite a dis-

tance westerly from the levee? A. Yes.

On cross examination this witness, Morris Scheiber, stated that you could see from the road the trees across the levee and the openings in them, etc. And then in answer to the question "What did you say about the land going over the levee?" the witness answered, "I did not say 'the land going over the levee.' I said the line goes over across the levee to the old Feather River, clear over to the Feather River." (Trans. P. 359.)

Q. You told her that the land went to the river? A. Yes.

Q. Did not say that any land went across the river? Across where?

Q. Did you tell her any land went across the river? A. No, not across the river. I says "Over to the old Feather River,"

Again on Page 364, on cross examination:

"Q. You can't say now whether she understood about the river being up against the levee, or not? A. She understood perfectly. I told her that the land goes clear out to the river, over across the levee out to the old river there, and I pointed it out to her."

Again on next page:

A. Yes, I told her over across on the other side of the levee, clear over to the Feather River, the old Feather River.

It will be recalled that Morris Scheiber was talking to Miss Garwood and told her the boundaries, when his brother Joe drove Miss Garwood around the ranch in the buggy, and that this was the second time she visited the ranch and was before the signing of the contract for the sale.

On page 382 of the Transcript, Joseph Scheiber states that Morris on the occasion of the second visit told her that the boundary line ran over along Claus Peters, over across the levee, clear out to the old Feather River, that he represented the Feather River as being one of the boundaries of the place. On page 387 he tells about the wood and testifies that she asked what is the land on that side of the levee good for? and that Morris told her it was good for wood, that is the place where we got the wood. She says "Is there a market so a person can sell wood?" and I says "Yes, people come in from the plains in the fall and buy wood."

On the same page he further testified that they could see the trees from where they were in the buggy.

On page 386 Joseph Scheiber states that the first time that she came up he talked with her at the ranch house and pointed out from there the true lines.

In many places in the testimony it appears that the Scheiber Bros. told her in answer to her question as to how many acres the land contained that they never had it surveyed; that they bought it for 600 acres, more or less, and that they were selling it the same as they bought it.

It is more than reasonable to assume that the plaintiff asked them the number of acres, and their testimony that they answered that they had never had it surveyed; that they bought it for 600 acres, more or less, and were selling it as they bought it, is most convincing.

In passing, we might say that the land was

bought as 600 acres, more or less, that it did contain more than 600 acres; that in spite of Miss Garwood's claim that it was verbally represented as exactly 600 acres, the very first time that Dike prepared a written memorandum in reference to it he stated in that memorandum that it contained 600 acres, more or less. This was the receipt of September 25th. It was approved and signed by the plaintiff, and the duplicate was left with her or her agent. Hence her testimony that it was represented to contain exactly 600 acres is absurd and contrary to the overwhelming evidence and contrary to the written documents in the case. But, going back to the matter of the boundaries and clear land. Since the plaintiff herself admits that the *true lines were pointed out to her, that she did know that there was land across the levee; and that she did know that some of the land was covered with trees*, it is impossible for her to claim that representation, if any, that the land was clear and level, applied to the land across the levee.

She was asked by Dike in the presence of the owners of the property to go up on the levee and look at the outside land and she said "I cannot walk up a hill." (Tr. p. 207). There was no attempt to conceal anything. This certainly was sufficient to apprise her that there was land to the west of the levee.

Now let us examine the written evidence in the case and see if plaintiff has any excuse whatever for not knowing that the river was one of the boundary lines of the ranch:

Probably the first writing that plaintiff saw in

which the Feather River was referred to was the paper advertisement, Plaintiff's exhibit 5. In this circular the land is referred to as being on the east bank of Feather River.

The next writing evidently was the receipt which was given her when she made the deposit of \$5000 (Tr. p. 202). In this the land is described as being on the east side of Feather River.

We then have the abstract of title in which the land is described as being on Feather River. (Defendants' Ex. K).

We also have an opinion of Mr. White on the title in which the boundary line is shown to be Feather River (Defendants' Ex. D).

We also have the contract of Sept. 27 in which the river is stated to be one of the boundaries of the ranch (Defendants' Ex. A).

We also, have the deed from the defendants to the plaintiff in which the river is again stated as forming one of the boundaries of the farm.

With all of this written evidence, together with the testimony of the three Scheiber boys and the admissions of the plaintiff herself, it would seem that it ought to be sufficient to show that there was no deceit practiced on the plaintiff as to the boundary of the ranch.

#### (b) THE REPRESENTATION AS TO ACRE- AGE IN ALFALFA:

It will be recalled that in the circular or pamphlet, which plaintiff swears was handed to her by Dike, it was stated that there were 300 acres

then and there planted to alfalfa; that plaintiff in her verified complaint and suit for rescission swore that it was represented to her that there were then and there 300 acres planted to alfalfa, and that she believed and relied on that representation (see Judgment Roll in rescission suit, Defendants' Ex. F); that in the complaint in the action at bar she swore that it was represented to her that there were 250 acres planted to alfalfa and that she believed and relied on such representation. But to our astonishment, on cross examination, in answer to the question:

Q. As yet you have not said who represented to you that there were 250 acres?

She answered:

*Mr. Dike told me that there were 250 acres. The Scheibers that day that we were there, not when they were talking to me on the porch, but they told the doctor there were 250 acres but 50 acres had washed out when the levee broke.*

Q. *And there were 200 acres left?* A. *200 acres of alfalfa left.*

Q. *Was that on the first day you were up there?* A. *Yes.* (See page 209), and at the bottom of page 210 we find this testimony:

Q. Did they at that time tell the doctor and Mr. Dike in your presence that there were 250 acres originally, but that 50 acres had washed out? A. They said that 50 acres washed out when the levee broke once.

Q. *They did not represent there were more than 200 acres then?* A. *No, I understood there was only 200 acres when I bought it. Dike told*

*me that before I bought.*

Just before the last quotation on the same page following up questions along the same lines this question was asked:

Q. How did the conversation come up? A. I don't know, I was not listening. They were not talking to me, etc.

When asked further on page 212 if she did not swear in this Court and in this complaint that it was represented to her that there were 300 acres of alfalfa she answered: "First they said there was 300 acres altogether—Dike said; then afterwards he said there were 250 and 50 acres had been washed out.

Q. You knew that when you swore to the complaint, when you testified on direct examination? A. *I can't remember all of those little things that they told me.*" (The rest of the answer which related to Steude was stricken out).

Turning to page 170 of her testimony we find where she said when asked which way they went back on that first trip: "A. I could not tell you which way we went. I was talking and not paying any attention. *I was not interested in the land at the time at all.*"

It will be seen from this testimony that while the plaintiff in her rescission suit swore that it was falsely represented to her that there were 300 acres planted to alfalfa and that she believed and relied upon such representations, and while in her complaint in this case she swore that it was represented to her that there were 250 acres in alfalfa and that she believed and relied

upon such representations, we find her admitting in unequivocal language that she knew from several sources before she bought the land that there were only 200 acres planted to alfalfa. We find further that the allegations in her verified complaint alleging that certain boundaries were pointed out to her were admittedly untrue. In other words, she swore that the west boundary was the levee. She admitted, under oath, *that they pointed out the green line and said that the line went beyond the green line of trees.* She admitted that *later and prior to the commencement of the suit she actually discovered* that there was a large quantity of land beyond the levee and beyond the trees and yet she comes into Court with a sworn complaint swearing under oath that the defendants pointed out to her the *levee* as the west boundary.

Now, let us see what is her excuse for thus trifling not only with her oath, but with the property rights of these defendants and with the dignity of the Court.

We find the excuse on page 207:

Q. When they pointed out the boundaries, they told you "that green line over there," and they pointed in the direction of the levee? A. In the direction of the levee.

Q. And the green line was trees beyond the levee? A. *I took it that they were trees on the slope of the levee, the same as I had seen the day before, going down the river.*

In other words, her various sworn allegations about the misrepresentations are shown to be and admitted to be absolutely false, and known to her

to be false before she commenced the suit. Yet, her only excuse is that she was mistaken at the time that the boundaries were pointed out.

Again, in the same connection we find that Mr. Dike tried to show her the land across the levee. The defendants had nothing to conceal. They had a tract of land that was worth \$75,000 to anybody and they were selling it on its merits. The land across the levee they considered of little value and never had considered it of any particular value, but they were willing that everybody should see what there was, and in good faith they were showing and telling them everything.

Turning to page 207 of the testimony we find that Miss Garwood testified that Dike asked her to go up on the levee and look around the country. She was asked this question: "Q. Mr. Dike, are you sure he used the words 'around the country?'" A. In the first place, I didn't understand his question altogether, it was simply, '*Would you like to take a walk up and look around.*' That is what it amounted to, and I said 'No, I want to see the farm,' and I said '*My ankle is too sore, I could not walk up a hill.*' "

In the face of the fact that no one tried to conceal anything from her; that she was invited to look at the land over the levee; that she was told that the line went over beyond the trees across the levee, she says that they represented to her that there were 600 acres of all clear level land, and she testifies that she said to them "You have told me all the good things about the place, now tell me the bad things," and they said that it was all good clear level land. Each of the defendants deny that they ever made any such misrepresen-

tations, or any misrepresentations, and in view of the fact that the land was not clear; that she knew it was not all level, and in view of the things that Joseph Scheiber did tell her about the land, such a statement by her is absurd and not worthy of credit. (For the purpose of this portion of our brief we are not discussing the fact that Dr. Ramos carefully examined the entire property and that she is fully bound by all that he saw and was told.)

Now, what did Joseph Scheiber tell her about the land? He told her the correct boundaries (See page 382). He told her about the land across the levee and that it was used for wood purposes (See page 383). Mr. Dike asked her, in his presence, to go up on the levee and look at the land on the other side (see page 383). Morris told her in his presence that the land contained 600 acres, more or less (see page 382); that the witness did not tell her that it contained 600 acres of the finest alfalfa land; that he did not tell her that it contained 300 acres of the finest alfalfa land in California; that no one told her this in his presence; that he did tell her about the land being subject to overflow, and said he told her the lower land "when the back water came up real high goes under water—all the lower land—lower part of the land when the river breaks above, then the water come over the land too, over the alfalfa," and that that was the first time she was up there. Their object in taking the buggy ride was "to show her the lines and everything what a man ought to show her;" that he did not tell her anything about the place that was untrue (see page 386). That no one else in his presence ever said anything to her about the

place that was untrue; that she could see the back land from the house; that the boundaries were pointed out each of the two times she was up there before the contract was made (see page 386); that at Mr. White's office was said nothing to the effect that she was buying 600 acres of the finest alfalfa land in California.

On cross examination he said she was told about the land outside of the levee; that the correct lines were pointed out to her; that he told her the back land overflowed (see page 388;) that he told her these things because he wanted to tell her the truth (see page 388). Again on page 396 he testified that he did not want her to misunderstand anything; that he told her the back land was used for pasture; that he did not tell her the back land was just as good alfalfa; that he told her it was not as good as the front land. On page 397 he testified that he never considered that the land west of the levee was of any particular value except for wood; that that was about all, except that they sometimes turned their stock over here.

That the boundaries of the ranch were correctly pointed out to plaintiff by Mr. Dike, one of her witnesses, is shown by his testimony at page 260:

“Q. If you went to the ranch with Miss Garwood and Mr. Ramos before any contract of purchase was entered into between Miss Garwood and the Scheibers, which parts of the ranch did you go over, if any, and how did you go over it?  
A. We drove around the road and through the fields in an automobile and then we walked over parts of it; parts which they wanted to examine more carefully.

“Q. If you went to the ranch with Miss Garwood and Mr. Ramos, did you point out the boundary of same? A. Yes.

“Q. If you went to the ranch with Miss Garwood and Mr. Ramos, state why you went, how many times you went, who was with you, the object of the visit or visits, and what was said, if anything, to Miss Garwood about the boundaries of the ranch, the acreage contained therein or the acreage planted to any particular product.”

“A. We went for the purpose of selling the property to her, a number of times, at least three or four times, with Miss Garwood, Mr. Ramos and the chauffeur. The object of the visits was to examine the ranch and satisfy them of its qualities and desirability as a dairy ranch. About the boundaries, we drove along the line of the property where the roads followed the line and walked over to the line in places where it left the road, and also pointed the boundary line by fences, levee and river boundary. We stated the acreage to be six hundred acres, three hundred acres planted to alfalfa and the balance pasture land, parts of which was adapted to alfalfa.”

Morris Scheiber testifies (page 347) about pointing out the lines. On page 348 he says she asked about the back land overflowing and that he told her that it was overflowed \* \* \* when the water came up “real high it backs up into the lower places there in the back field—it comes up quite a ways into the ranch;” that Miss Garwood never said to him “You have told me all the good things about the ranch” and to tell her some of the bad things about the ranch; that she never

used any such language there; that the levee was dry and not green grass on it at the time (page 349); that the green trees were on the other side of the levee and could be seen to extend quite a distance westerly from the levee; that he had not told Miss Garwood that the levees on the ranch were all complete and that she would not have any assessments to pay; that he told nothing about getting \$5000 back; that he made no untruthful representations to her concerning the property; that he answered all her questions truthfully (page 350); that in Mr. Dike's office he told her the land contained 600 acres, more or less; that they never had it surveyed and that was the way they were selling it; that he never placed a price per acre on the land; that Miss Garwood and Dr. Ramos tried to get the property for less than \$75,000 and Dr. Ramos also wanted them to reduce the price; that they told them why they would not take any less for it (page 351). On pages 351 and 352 witness recounts a clever answer that he gave to the Doctor when the Doctor tried to get him to throw in the hay that had been grown on the ranch that spring.

On page 353 he tells about what occurred at the office of Mr. White, and that Mr. White was not interrupted and that Miss Garwood did not make any statement about buying 600 acres of the finest alfalfa land in the State. At page 355 he states that he never heard about any commissions having been paid Dr. Ramos until long after the Deed was made, and signed. At page 356 he tells of the man who tried to buy the place after they had signed the contract with Miss Garwood. On page 364 he says that Miss Garwood understood

his description; that he told her the land went clear over to the old river and he pointed it out to her; that he did not tell her how much land was out there, *and that she did not ask*. On Page 367 he testifies that she was up at the ranch twice before the contract was signed, as does also every other witness in the case, who was asked about the matter.

John Scheiber testifies that she was up there three times before the Deed was made out (page 375); that nobody in his presence told her that there were 600 acres of alfalfa land, or that it was all clear, level land, or that there were 600 acres in the place; that they never saw the circular or pamphlet marked "Exhibit 5" (see page 376; that they did not tell her the land was not subject to overflow; that they did not tell her it was all sub-irrigated; that everybody told her the truth about the place that he heard speak about it; that she was at the ranch twice before the contract was signed (see page 377); that Morris was not at the ranch the first day that she came up; that she asked the first day how much alfalfa they had; about the line (page 378); that he told her there was timber over across the levee and she could see it; that she asked what the land out there was good for; that he told it was good for wood (page 379); that he said that the land went clear over to the river; that he does not remember whether he told her the land out there was subject to overflow or not; that he never told her that the land was free from overflow; that he does not remember about ever talking about the land overflowing.

In the face of this testimony, and in the face of

the facts, plaintiff's allegation that it was represented that the land contained 600 acres and was all clear, level land, and that there were 250 acres then planted to alfalfa is contradicted by the conditions she saw; by the facts as they were and by all the witnesses. Hence these representations not only *are not proved by clear and decisive testimony*, but are overwhelmingly disproved.

(c) In the foregoing discussion we have covered the allegations of the original complaint down to the visit to Mr. White's office. While counsel left the allegations of the complaint concerning the wrongdoing on the part of Mr. White in rather an uncertain state by reason of not attempting to prove them, still a word or two of comment upon the allegation might be considered appropriate. He testified that Miss Garwood may have asked him about the expression "more or less," if so, he explained it as he would explain it to anybody—that there might be more and there might be less than 600 acres. See page 159 of Transcript.

When asked if Miss Garwood at any time said to him that it was her understanding that she was to get 600 acres of the finest alfalfa land in the State of California, he answered that he could not recall that she used any expression of the kind; that she spoke enthusiastically about the place, and that he had a faint recollection that she asked his opinion of the place, and he said that he told her that he did not know—that it was in a good neighborhood, and that alfalfa land was a good thing in California. See p. 160 of Transcript.

Turning now to Miss Garwood's testimony:

She says that in the midst of the reading of the contract she stopped Mr. White with the statement that she had never agreed to buy 600 acres, more or less, etc. (see page 184 of Transcript); that Mr. White very deliberately stood up, turned his back put a book on the shelf and said " 'Miss Garwood, it means 600 acres, that is only a law term' *and I signed it.* "

The plaintiff, evidently, is very seriously confused over this matter, as she is over all the other matters involved. In the first place, she may have asked him when he reached the reading of the number of acres which are mentioned on the first page of the contract what the words "more or less" meant, and he may have said that it was a law term, but if so, he said, as he testified, that it meant that there might be more than 600 acres, or there might be less than 600 acres. And when the reading of the contract was finished she probably said that she thought she was getting a good bargain and that she was buying some fine alfalfa land. As they were then ready to sign the contract Mr. White may have picked up a book from the desk and put it on the shelf, making room for signing the contract, at the same time explaining to her that he did not know anything about the land, but that it was in a good neighborhood and that alfalfa was a good crop in California—all of which would be natural and reasonable.

But Miss Garwood says when she interrupted him in the very beginning of the contract, that "*he deliberately stood up, turned his back, put a*

book on the shelf and said, 'Miss Garwood, it means 600 acres, that is only a law term' and I signed it.'" These last words show clearly that she did say something to him *at the time they* were ready to sign the contract, at which time the removal of the book was a natural thing to do. Miss Garwood's explanation of her remembrance of the occurrence is so absurd and unreasonable and Mr. White's testimony so consistent with what would be natural and likely under the circumstances that it seems quite certain that the plaintiff has thought so much over her case that she is quite confused as to what was said by anyone in the premises. Besides, the representations which plaintiff seeks to imply by this conversation have been disproved by overwhelming testimony and by admitted facts.

In connection with the suggestion which plaintiff throws so frequently into the case that it was represented to her that she was buying 600 acres of the finest alfalfa land in the State, we might say that it would be so easy for plaintiff to get this impression from most innocent remarks of the various parties. She claims she got the impression that there were exactly 600 acres of land in the place—but there were more. She claims she got the impression that there were 300 acres, growing five or six crops of alfalfa to the year, whereas she was told there were only 200 acres. She may have asked in this connection, Is land that produces that many crops a year considered good alfalfa land? And the answer, undoubtedly, would be: The finest in the State. So, in a dozen different ways in speaking with the parties about the alfalfa, they having in mind the 200

acres in alfalfa, and she having the whole ranch in mind, she might have reached the erroneous conclusion that their answer referred to the whole ranch. What the parties did, undoubtedly, say to her was that it was one of the best dairy farms in the State of California, and they may, even, have said that it grew as fine alfalfa as any land in the State of California, both of which representations were absolutely true, but nobody ever told her or intended her to believe that the whole ranch was the finest alfalfa land in the State of California.

Taking into consideration the fact that the Scheiber brothers testified that she visited the property; the fact that they told her the back land was subject to overflow; that it had been used as pasturage, and made the other explanation that they made in reference to the West boundary and to the back land and truthfully answered all her inquiries; the fact that her personal inspection disclosed facts diametrically opposed to the representations she alleges, it is clear that she had not proven her allegations by clear and decisive proof.

(d) Coming now to the allegations of the amended complaint to the effect that it was represented to her that this land was all sub-irrigated land. We desire to make these comments:

From the plaintiff's own testimony we find:

FIRST: That at the time she was viewing this property she was paying little or no attention to what was said about it.

SECONDLY: That she was not familiar with alfalfa lands, or with any land for that matter.

THIRDLY: That the trifling matter of whether there were 300 acres or 250 acres, or only 200 acres in alfalfa was, according to her testimony, a matter of no consequence to her; and

FOURTHLY: When her attention was specifically called to her various and varying sworn allegations in reference to alleged representations as to there being 300 and then 250 acres in alfalfa, when, in fact, she was positively told before she made the allegations that there were only 200 acres in alfalfa, the fact that she said *I can't remember all those little things they told me*" shows how impossible it is to rely on her statements.

Now, taking all these matters into consideration, what attention did plaintiff pay to any statement about the land being sub-irrigated, and what influence does this Court suppose the alleged statement about sub-irrigation if made had on her when she did not pay any attention to a little thing like the difference between swearing that it was represented to her that there were 300 acres in alfalfa, when she was positively told that there were only 200 acres.

There seems little doubt that, if the word sub-irrigated was used at all, it was used wholly in reference to the 200 acres that were in alfalfa, and it would have been the most natural thing in the world for one, or more of the parties, in speaking of the alfalfa growing on the place to say that it was sub-irrigated, but there is no doubt that no one intended or tried to convey to her the impression that the whole ranch was sub-irrigated. In the first place, the defendants told

her nothing of the kind. In the second place, Mr. Dike had no authority to make such a representation. In the third place, he did not make such a representation, and in the fourth place, it would have been a mere opinion if he made it. In the fifth place, if Mr. Dike did actually make the representation that she claims he made the first day about the ranch; if he did hand her the circular that she says he did, then when she viewed the ranch and was told and saw the conditions as they existed, she was not in a position where she could rely any further on any representations made by Mr. Dike, because she knew from what she saw and heard, and, for that matter, from Mr. Dike's own admissions that his statements were not to be relied upon. We will later cite authorities substantiating this and the other points that we make.

Further this trade for this land was made directly with the defendants. The Colonization Company was never authorized to do anything other than to find a purchaser. No authority was ever given it or any of its officers to bind the defendants. The contract of sale was signed by the defendants. The plaintiff made her inquiries and investigations with the defendants who were the proper parties to give her information, and each of these defendants deny emphatically that they ever told plaintiff that the land was sub-irrigated.

## II.

*The question whether or not the representations made were false, necessarily has been combined to a greater or less extent with the question as to what representations were actually made.*

From all the testimony in the case; from the explanations that were given to Miss Garwood personally by the defendants—and there is no doubt that she made full inquiries in reference to the property, though she hides behind the statement that she was not paying any attention—it is clear that no misrepresentations whatsoever were made to her, but that on the contrary the facts and the true facts in reference to the property were fully and fairly stated to her by all the parties. It is therefore, plain that she has failed to establish by either clear or decisive evidence:

I. That the defendants made the representations she claims were made.

II. That the representations actually made were false.

And both of these failures are fatal to a recovery in this action.

### III.

*The next question is whether or not the representations which were made by the defendants were not actually believed by them on reasonable grounds to be true.*

Assuming that Mr. Dike, or any of the other so-called agents, made any representations which were untrue, and which the plaintiff was entitled to rely upon, as representations of fact, and which she did rely upon, *the question is did these agents have reasonable ground to believe these things to be true, or if not, were these representations merely opinions?* And, finally, the question arises *whether or not the agents had any authority to make any representations.*

We might, even, add that the alleged agents for the defendants became plaintiff's own agents in the transaction and took up her side of the case in an endeavor to secure the land for less than the price asked by the defendants, after the plaintiff had agreed in writing to buy at that price, provided the agents could not get the land for her for less. Thus, she made them her own agents.

Discussing these matters in order we have:

1. Did the agents make any representations of fact which they did not have reasonable grounds to believe to be true? We do not think they did. There is nothing to show that they did though the plaintiff may have reached a wrong conclusion from the things which they stated. But did she prove that they did not have reasonable grounds to believe they were true?

Assume that the agents did assert that the land was *all* first class alfalfa land; that it was all sub-irrigated; that 300 acres or 250 acres were then in alfalfa and that the balance not then planted could be planted to alfalfa; that the land was protected from overflow by levees; that it was all known as river bottom land and was what is known as sub-irrigated land; that without irrigation alfalfa could be raised upon said land to such an extent as to yield five to six cuttings of alfalfa every year, it is quite plain that the agents may have had reasonable grounds to believe that these statements were true, unless an inspection of the premises readily showed them to be false. And if we assume that plaintiff has proven the allegations of her complaint and amended complaint through representations made

by the alleged agents of the defendants then *she has not proven in any way that the agents knew or had good reason to know their statements to be false*. On the contrary, according to the plaintiff, she would have us believe that her own inspection of the premises did not disclose that these representations were false. We are satisfied from the case as a whole and from all the facts before the Court that the alleged agents never made the representations claimed by plaintiff to the extent or in the manner stated by her.

They may have said, referring to the alfalfa land, that it was first class alfalfa land; that a part of the land was used for pasturage, but that it was clear and level and was suitable for the raising of alfalfa; that it was protected from overflow by a levee; that it was river bottom land; that it was sub-irrigated land and would grow alfalfa without irrigation, but all these matters were substantially true and the agents believed them to be true. Besides, practically all of them, if not all, were mere matters of opinion.

We will clearly show in this connection that the plaintiff had no right to rely upon these representations, if they were made, and that she did not rely thereon. And finally that the agents had no authority to make any representations.

2. It is quite the custom for agents to make boosting remarks in reference to property they have for sale and everybody expects them to be made, and the Courts have frequently held that such things are permissible. Hence people do not place, and are not permitted to place, any great reliance on an agent's boosting talk, par-

ticularly when he is a total stranger, but usually investigate for themselves.

As to examples of the things that are held to be mere matters of opinion, we cite the following California cases, and it is with the law of California, or the law as laid down by the Supreme Court of the United States in California cases that we have to do.

“There is nothing in the circumstances that the defendant expressed a somewhat favorable opinion of his wool, and he indulged an opinion that, while Mr. Conn’s wool might be a little finer than his own, his was fully as profitable as Conn’s for manufacturing purposes. This was mere praise of his own property—the simplex commendation which is allowable in making a trade, and is not held, by the rule of the common law, to amount to a warranty.”

*Byrne v. Jansen*, 50 Cal. page 627.

“It is apparent to us that the matters alleged as constituting the fraud were matters of opinion rather than of facts. It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in Lone Valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits; and the other matters alleged may well be classed under the head of matters of opinion rather than a false representation of facts. There is no averment which excludes the idea of personal inspection by the purchaser.”

*Rendell vs. Scott*, 70 Cal, 515.

“All that the evidence tended to show in that regard was in substance, that Unruh, who was

the agent of one Baldwin in subdividing and disposing of some lands of the latter in Los Angeles county, with accompanying water privileges, and who was familiar with the requirements for the successful cultivation of oranges, represented to defendant, who was ignorant of the value or character of the land, that he ought to take a piece of the land and put it in oranges; 'that it was good orange land; would raise oranges,' and make defendant a living; that it 'was first class ground,' 'decomposed granite' or 'gravel' and 'free from frost.' To sum it up in defendant's own language: 'He said it was fine orange land, and I could put out oranges and go east in the summer and come back and I would get a crop of oranges; and on the strength of that statement I purchased the land,'

"It is quite obvious that such statements made by a seller of land, even admittedly to induce a purchase, cannot be made the predicate of false or fraudulent representations such as will avoid a contract of sale. They are the exaggerated, and it may be the reckless, declarations of an eager trader, holding out the golden promise of profit to induce a sale; but after all they are but the expressions of a vender's opinion, actual or pretended, upon which the purchaser will rely at his peril. As said in *Rendell v. Scott*, 70 Cal. 514.

" 'It is apparent to us that the matters alleged as constituting the fraud were matters of opinion rather than of facts. It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in Lone Valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits; and the other matters alleged may well be classed under the head of matters of opinion rather than a false representation of facts. There is no averment which ex-

cludes the idea of personal inspection by the purchaser.' ”

*Lee v. McClelland*, 120 Cal. Page 149.

“ ‘The assertion of that which is not true,’ which is thus made actual fraud, must be of some fact not warranted by the information of the person making it, and cannot be held to include an opinion of the person, however erroneous such opinion may be, or with what degree of positiveness it may be asserted. The statement of Neville to the deceased was not the assertion of any fact, but was merely the expression of his opinion as to the effect produced upon the first will by the execution of the subsequent one.’ ”

*Estate of Johnson*, 134 Cal. Page 663.

“ ‘In *Johnson v. Johnson* 134 Cal. 662, (66 Pac. 847) it is said: ‘An assertion of that which is not true in order to constitute a fraudulent representation cannot be held to include the opinion of the person however erroneous it may be or however positively stated.’ (See, also *Lee v. McClelland*, 120 Cal. 147, (52 Pac. 300); *Lloyd v. Kehl*, 132 Cal. 107, (64 Pac. 125); *Colton v. Stanford*, 82 Cal. 398, (16 Am. St. Rep. 137, 23 Pac. 16); *Oppenheimer v. Clunie*, 142 Cal. 317, (75 Pac. 899).’ ”

*Henry v. Continental Building, Etc.* 156 Cal. 675.

“ ‘An assertion of something not true must be of a fact not warranted by the information of the person making the assertion in order to be a fraudulent representation, and not merely the opinion of such person, *however positively asserted.*’ ”

*Winkler v. Jerrue*, 129 Pac. Rep. P. 804.

“ ‘Representations as to what a ranch will produce in the future are not representations of ex-

isting facts, but are merely speculative surmises, and are not ground for rescission of any exchange of lands.”

*Bickel v. Munger, et al.*, 129 Pac. Rep. 958.

From these authorities it is clear that the alleged statements of the alleged agents that this land was first class alfalfa land; that 250 acres were then planted in alfalfa; that the remainder could be planted in alfalfa; that it was protected from overflow; that it was river bottom land and that it was sub-irrigated were mere matters of opinion. But if made, they were true. It is a fact that such representations might not have been true as to every acre in the ranch, but they were true about the ranch. And if the agents did assert that all the ranch was of exactly this same character then that was a mere *boosting assertion* of an agent upon which a *purchaser does not have the right to rely*. However, the evidence in this case is more persuasive that the representation that *all* the ranch was uniformly of the character suggested above was not made by the alleged agent. Nor did the plaintiff rely upon any representations of the agents. She investigated for herself, and proof shows conclusively that she knew that the land beyond the levee was not in this condition, and we have shown positively by the testimony of the three defendants that *she was informed of the actual facts* in reference to the remainder of the land.

3. Did the agents have authority to make any representations whatsoever? The plaintiff knew that Dike was only an agent and she was bound to inquire into the extent of his agency. The facts are uncontradicted that Dike telephoned to

the Scheiber boys and asked whether the place was still for sale and that they said they would sell it for \$75,000 provided the purchaser took the personal property, also, and that they would pay a commission on the purchase price of the real property. They were, therefore, mere middle-men without authority to make representations and the plaintiff was bound to ascertain to her peril what authority they had.

Since the agents were expressly authorized to sell this property for the sum of \$75,000, no more and no less, the position occupied by Dike and his associates was that of mere middle-man. And they come squarely within the rule laid down in the case of

*King v. Reed*, 24 Cal. App. 229, 141 Pac. 41. wherein the District Court of Appeals of this District held that:

“A middle-man is a broker whose duties are limited to finding and procuring a purchaser ready, able and willing to accept his client’s terms, or to effect a transaction with his client on any terms satisfactory to both; that the term middle-man is merely descriptive of the nature of the employment. And the agent is in no fiduciary relation to his principal, nor under any obligations not to receive compensation from the opposite party to the transaction.”

*King vs. Reed*, 24 Cal. App. 235.

An agent authorized merely to sell real estate has no power to bind his principal by representations as to the value, quality or quantity.

*National Iron Armor Co. v. Bruner*, 19 New Jersey, Equity, 331;

*Samson v. Beale*, 27 Wash. 557, (68 Pac. 180)

*Iowa R. Land Co. v. Fehring*, 101 Northwestern 120 (Iowa);

*Lake v. Tyre*, 90 Virginia, 719;

*Kennedy vs. McK.*, 43 New Jersey Law, 288;

*Cooley on Torts*, 487.

In the case of *Samson v. Beale*, *supra*, a purchaser of realty sued for damages for a sum expended in completing a foundation under the building, alleging the vendor's agents falsely represented that there was a complete and sufficient foundation. He knew that the agents had authority to collect rents, pay taxes, and look after ordinary repairs, and to receive offers for sale, but could not complete even the terms of a sale without submission to the owners. The agents told him the name of the contractor who put in the foundation, and showed him plans alleged to be those of the contractor, but which in fact were old and abandoned plans accidentally left in the agent's hands. Held, that a motion for a nonsuit should have been granted, as plaintiff should have consulted the contractor or owners, and was not justified in relying on the agent's statements.

*Samson v. Beale*, 68 Pac. Rep. 180.

The same rule is stated in slightly different language in this State in the early case of

*Mudgett v. Day*, 12 Cal. 139-140,

wherein the Supreme Court of this State said:

“Day having been apprised that Humphries was only holding the note for collection and as the agent of Mudgett, as is clearly indicated by the

agreement, was bound to inquire into the extent of his agency. He was bound to ascertain whether he had any right to make such an agreement as that set up in the defense. *There was no proof that he had.*”

This is the same rule laid down in

31 Cyc. Page 1322, Note 66.

and many cases cited in Note on following Page 1323.

The rule is again laid down clearly in this State in the case of

*Davis vs. Trachsler*, 3 Cal. App. 554-559, (86 Pac. 610-612).

The question involved was the authority of a real estate agent and the obligations of third parties dealing with him to ascertain his authority. We quote from this case as follows:

“There is no testimony tending to show the instrument by which Hopkins was appointed was recorded. But it was known by appellant that he was holding himself out to be the agent of Davis. The receipt and contract of May 24th, 1897, was signed *as agent*. The appellant having *actual notice of the agency*, it was incumbent on him to ascertain the scope of authority possessed by Hopkins \* \* \* \* \* An agent can only bind his principal when he acts within the scope of his authority.”

*Davis v. Trachsler*, 3 Cal. App. 559.

The rule that an agent authorized merely to find a purchaser cannot make representations as to quality, quantity or value is inferentially affirmed by our Supreme Court in the case of

*Henry vs. Continental Bldg., Etc., 156 Cal.  
667,*

where in the Supreme Court of this State held:

“Local agents were without authority to make and conclude terms with prospective investors and borrowers \* \* \* \* \*

*If as appellant contends, there be a finding that the local agent of the defendant made false representations to the plaintiffs by which they were induced to sign the note and mortgage, the same may be disregarded as immaterial, and, therefore, altogether insufficient of itself to support the judgment.”*

*Henry vs. Continental Bldg. Etc., 156 Cal.  
674.*

It, therefore, is clear that the agents had no power to make any representations; that plaintiff has been wholly unable to prove any untruthful representations made by the defendants.

## VI.

*Were the alleged representations made with the intent that they should be acted upon?*

Assuming then that the defendants and their agents made representations of material facts; that such representations were false; that they were not actually believed by the defendants or by the agents on reasonable grounds to be true, we now come to the next proposition which plaintiff must clearly establish or fail, namely:

*That the false representations were made with the intent that they should be acted on.* Plaintiff admits that after making the statements to her which the alleged agents made in reference to the

property and which statements she claims were false, *they invited her and her agent to view the property* and proceeded to take them to the property and to show them over it and even invited plaintiff to go upon the levee where she could have seen clearly the conditions of which she now complains so bitterly.

And, not only did they *invite the plaintiff to carefully inspect the premises, but they took her agent and confidential advisor over the entire premises and showed him everything*. It is therefore clear that if the alleged representations were made as plaintiff claims and were false, still it must be clear, and it is clear, *that they did not intend that these statements should be acted upon, but invited the plaintiff and her agent to inspect the premises and all thereof, and to see the facts for themselves*.

It is, therefore, clear that plaintiff has wholly failed to prove this fourth essential element in her cause of action.

The next element in her cause of action which plaintiff must establish by clear and decisive proof is:

*That such representations were acted on by plaintiff and in so acting on them she was ignorant of their falsity and reasonably believed them to be true.*

Here plaintiff strikes another fatal bar to her cause of action for damages for fraudulent misrepresentations.

Referring to the complaint in the suit for rescission duly verified by plaintiff and referring

also to the original complaint in the case at bar, prepared by different attorneys and under different circumstances and after careful consultation with their client, we find stated very clearly the things upon which plaintiff claims she relied in making the purchase.

Now, surely, at those early dates after the purchase, the plaintiff should have known what she did rely upon in the purchase of the property and here comes the remarkable fact that in neither of these complaints did plaintiff claim that she relied upon, or had ever heard of the representations set forth in the amendment to her complaint verified June 23rd, 1915, and filed thereafter, wherein, for the *first time* she makes the contention that it was represented to her that the property was what is known as *sub-irrigated land* and that it was *all protected from overflow by levees* and that it would *all produce from five to six crops of alfalfa per year*.

Now, if the plaintiff has relied upon the allegations that the land was all protected from overflow by levees, why did she not set this forth as one of the representations upon which she relied? She testifies that in the Spring of 1912 she learned that the back land was subject to overflow, *and yet it is not until 1915 that she claims that the land was represented to her as not being subject to overflow*. Again, if it was represented to her that the land was all sub-irrigated and *she relied upon this representation*, why did she wait until 1915 to state that such a representation was made and that *she had relied on it in making the purchase*.

In connection with the various complaints, we desire to call attention to the fact that in the suit for rescission she alleged that it was falsely represented to her that the land was *not in a reclamation district*, and *that that was one* of the things upon which she relied. She did not repeat this allegation in the present case and the evidence shows that *before she closed the deal she knew that the land was in a Reclamation District*.

In fact, before she closed the deal, that is before she paid for the property, *she was advised that the reclamation district would return to her \$5000 because of the fact that she had her levee constructed*. She swears that this was told her the first day she was on the property, but the evidence is to the contrary. We cite this reference to the Reclamation District simply to show that plaintiff has at all times been reckless in her statements about the representations which were made to her, and the things upon which she did rely. And at this point we call the attention of the Court to the well known rule of law of this State:

*“That a witness false in one part of his testimony is to be distrusted in others.”*

*C. C. P. Sec. 2061.*

There are other fatal defects in plaintiff's alleged reliance upon the alleged fraudulent representations and these fatal defects are as follows:

1. That if the representations were made by the agents that *all the land* was of the character alleged, then her viewing the premises and her agents viewing the premises disclose the fact, according to her own admission, that there was land

across the levee that *was not protected by levees* and that *was not clear*. Therefore, if the agents had represented that *all the land* was of uniform character then when she thus found that one material statement was untrue, she had no right to rely upon any of their alleged representations.

Again, she claims it was represented that there were 300 acres in alfalfa and yet she admits that subsequently she was positively told there were only 200 acres. This knowledge destroyed her right to rely upon any representations of the agents.

We will first cite the case of

*Perkins vs. Center*, 35 Cal. 713-725.

Where in it was held on page 725 of the decision that a certain fact learned by the plaintiff "*was sufficient to put her upon inquiry.*" Again, that a certain other fact "*was of itself sufficient to awaken inquiry and put her upon her guard.*"

And this rule was forcefully reiterated in one of the latest decisions of our District Court of Appeals, in a case of alleged misrepresentations, where the parties had, as in this case, the means of knowledge at hand, and *where, having learned that one material matter had been misrepresented to them, they were bound to make a full and complete investigation of all the facts.*

The case referred to is:

*Gratz v. Schuler*, 25 Cal. App. 117-120-121-122, (142 Pacific 899).

The Court after (page 120) stating the var-

ious elements which plaintiff must prove in order to prevail, on page 121 stated the general rule as follows:

“If one party to a contract is justified in relying and *does in fact rely* upon *false representations*, his right of action for rescission or for damages for deceit is not destroyed merely because he did not avail himself of the means of knowledge immediately at hand as to the truth or falsity of the representations. *Ruhl v. Mott*, 120 Cal. 668, (53 Pac. 304); *Neher v. Hansen*, 12 Cal. App. 370, (107 Pac. 565); *Tarke v. Bingham*, 123 Cal. 163, (55 Pac. 759); *Willey v. Clemments*, 146 Cal. 91, (79 Pac. 850; but if he does avail himself of an opportunity to test the truth of the representations made, and thereby discovers prior to the consummation of the contract that such representations were false, he will not be heard to say that he was deceived by them. We take it that this proposition needs no authority to support it.”

The Court then continues:

“Ordinarily, perhaps, this might not be so; but having ascertained that the defendants falsely represented one material matter in the transaction, this was notice that the defendants may have been false in all else that they said; and therefore it was incumbent upon the plaintiff thereafter to make full investigation as to the truth or falsity of every other material representation. This is so, because the law does not undertake the care of persons who, with notice of a fraud and the means of prevention at hand, will not take care of themselves. *Ruhl v. Mott*, 120 Cal. 668, (53 Pac. 304); *Bacon v. Soule*, 19 Cal. App. 428, (126 Pac. 384).

*Gratz v. Schuler*, 25 Cal. App. 121-122, (142 Pac. 899 et seq.)

This case alone is conclusive of the case at bar, for her admissions that she knew the facts which showed that the land was not all clear and level and did not contain 300 acres of alfalfa, and was not all protected by levees, made in incumbent upon her, thereafter to make a full investigation as to the truth or falsity of every other material representation.

*Gratz v. Schuler*, 25 Cal. App. 122, Supra.

And where it is shown as in this case that a person is given ample opportunity for investigating for himself, he cannot afterwards say he relied upon the statements of others. It is his business to inquire into and ascertain what the facts are. In this case, plaintiff admits that she was inattentive and careless, when the defendants themselves were explaining the conditions of the ranch, and pointing out the facts to her and Dr. Ramos.

She cannot now be heard to complain that she did not learn the facts.

“A Court of Equity will not undertake, *any more than a court of law* to relieve a party from the consequences of his own inattention and carelessness.”

*Slaughter v. Gerson*, 80 U. S. (13 Wall) 379-  
(20 L. 3d. 627).

2. *The plaintiff did not rely on the alleged representations of the agents. She viewed the premises and she inquired of the defendants for the facts. Her agent viewed the premises and inquired of the defendants the facts.*

*The defendants told her the truth and the full*

*truth and the evidence is overwhelming to that effect.* Hence she has utterly failed to make out a case under any theory of it. But she did not rely upon the alleged statements of the alleged agents. Her viewing the premises proves this and precludes a recovery.

Thus in the case of

*Calton v. Stanford*, 82 Cal. 351,

The Court, on page 398, said:

“A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor’s foot the measure of individual rights. *The greatest liberty of making contracts is essential to the business interests of the country. In general, the parties must look out for themselves.*”

In the case of

*Wainscott v. Occidental, Etc. Ass’n*, 98 Cal. 253,

The Court, on page 257, said:

“The second position taken by appellant is that no matter what representations are made in reference to the *character and value* of property by a vendor if *the purchaser visit the property itself*, it being land, prior to the sale, and makes a personal examination of it touching those representations, he will be presumed to rely, not upon the representations, but upon his own judgment in making the purchase. *Farrar v. Churchill*, 135 U. S. 609, sustains the proposition contended for, but in the same connection it is proper to say that this rule must be taken subject to the proviso that the vendor does nothing to prevent his investigation from *being as full as he chooses*. *Southern Development Co. v. Silva*, 125 U. S. 259.

, There was nothing done in this case to prevent the plaintiff and her agent from making her investigations as *full as she chose*. On the contrary they were offered every opportunity to make investigations and were given full information and possession of all the facts about which they inquired.

In the case of

*Oppenheimer v. Clunie*, 142 Cal. 313,  
the Supreme Court of the State of California sets forth quite fully the law of this State in reference to actions based on false representations, and on page 319 says:

“The rule is thus stated by Pomeroy in his work on *Equity Jurisprudence* (sec 893): ‘If after a *representation of fact, however positive*, the party to whom it is made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue.’ ”

After considering this branch of the rule we will then note what follows and continue the quotation:

“*The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice required that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot*

*claim that he did not learn the truth, and that he was misled."*

Again on page 321 the Court quotes from *Commissioners v. Younger*, 29 Cal. 177, as follows:

*"A court of equity will not relieve a party from a contract on account of misrepresentation, when no confidential relation exists between the parties, and, where the means and sources of knowledge being equally accessible, and open to both, the party complaining has no right to place reliance upon the statement of the other; for the law aids the vigilant not the idle, and will not undertake the care of persons who will not, with the means at hand, take care of themselves."*

The law governing ordinary cases is clearly stated in a case cited by counsel for plaintiff, to-wit: in the case of

*Barron Estate Co. v. Woodruff Co.*, 163 Cal 561,

where on page 575 the Court said:

*"If, therefore, in point of law, it was the duty of plaintiff to have exacted the representation of these plans, specifications and estimates, its failure so to do would be a display of a lack of ordinary care and prudence, while, upon the other hand, if these plans and specifications and estimates had been demanded and were not forthcoming, there would be notice of trickery upon the part of the defendants and of a failure to live up to their written agreement. Unquestionably, then, if plaintiff was derelict and culpable in these matters, the inevitable results would be either a waiver of the fraud or estoppel by conduct from charging upon it."*

In that case the Court held, however, that the very parties who made the misrepresentations in

reference to the contract became *by the very contract itself the confidential and trusted agents and advisors of the plaintiff and by virtue of this agency and relation of trust and confidence it became the high duty of the defendants to make full disclosure of all the knowledge which they possessed.*

Thus distinguishing that particular case from the rule which applied to the case at bar and leaving the plaintiff in this case either fully informed, as the evidence clearly shows that she was, or stranded high and dry on the bar of her own inattention and carelessness.

“In the absence of a confidential relation, the defendants were under no obligation to volunteer information to the plaintiff which was as readily accessible to him as it was to the defendants, and as ‘the law will not undertake the care of persons, who will not, with the means at hand, take care of themselves,’ the mere silence of the defendants cannot be construed to be a fraudulent concealment sufficient to support an action for fraud.” (citing many cases).

*Bacon v. Soule*, 19 Cal. App. 428-439, (126 Pac. 384.

In this respect the District Court of Appeals of this State in the case of

*De Laval Dairy Supply Co. v. Steadman*, 6 Cal. App. 651-655 (92 Pac. 877)

on page 655 said:

“It is a general principle that if the means of knowledge be at hand and equally available to both parties alike, and there be no fiduciary relations, the injured party must show that he has availed himself of the means of information existing at

the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other.”

Quoting from *Slaughter v. Gerson*, 80 U. S. (13 Wall) 379 (20 L. Ed. 627) the Court said at the bottom of page 655 of the California Appellate Report:

“A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand equally available to both parties, and the subject of purchase is alike open to their inspection if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor’s misrepresentations. If, having eyes.. he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by over-confidence in the statements of another.” (citing authorities).

Finally, the Supreme Court of this State in the case of

*Moxon-Nowlin Co. v. Norswing*, 166 Cal. 509, on page 511 states clearly the rule in these cases.

This was an action to recover damages for alleged fraudulent misrepresentations in connection with the transfer of property. And the court found among other things that the plaintiff did not believe the alleged representations, that it did not enter into contract relying upon their truth, and, further, that it is not true that the plaintiff did not know until long after the deliv-

ery of the deeds that the lands conveyed by defendants to the plaintiff were of dimensions less than those represented. On the contrary, it was found that before any contract was entered into or deed made the defendant delivered to the plaintiff *or its representatives* a map showing the correct measurements of the property.

In the case at bar the defendants, according to plaintiff's own admission pointed out to her that the line went across the levee to the green trees and beyond the green trees to the river. While plaintiff does not actually say to the river, and her own admission that she thought it was the Sacramento River shows that she knew that the line went to the river.

Again, in the same case (166 Cal. 511) the court states the things necessary for a plaintiff to show before she can recover in an action for deceit and winds up with the statement that she must show that the alleged representations *actually did mislead and deceive*. Or, in other words, were relied upon by the party complaining.

The above authorities clearly establish the rule *so frequently laid down in this State that where a party instead of relying upon representations does make an investigation he is charged with all of the facts which by attention and diligence he could thus have learned and the further rule that where it is learned by the plaintiff that any fact has been misrepresented to him it is his duty to investigate all the facts.*

These two rules clearly distinguish the case of  
*Eichelberger v. Mills Land, Etc., Co.* 9 Cal.  
App. 628, (100 Pac. 117)

and other cases of a kindred nature relied upon or to be relied upon, by plaintiff. Thus in the case last mentioned (9 Cal. App. 628) it will be found that the rule is clearly laid down on page 636:

“In the *absence of an inquiry instituted by plaintiffs* for the purpose of ascertaining the dimensions of the land, and in the absence of knowledge as to the true dimensions, both of which facts appear from the findings, plaintiffs were warranted in relying upon the representations in that regard made to them by the seller \* \* \* \* \*  
*‘The mere existence of opportunity for examination or of sources of information is not sufficient.’ ”*

In other words, the rule is clearly and plainly stated that if misrepresentations are made upon which a person is asked to *rely and he does rely upon them and they are the facts upon which he is reasonably entitled to rely, then since he did rely and did not make any investigations, the party who induced him to so rely is bound by his misrepresentations so far as they are representations of facts upon which the party is entitled to base an action for deceit, and that when a party does so rely and does not institute inquiries the mere existence of opportunities for examination or for information is not a bar.*

On page 637 the Court says:

“We are unable to find anything in connection therewith *calculated to arouse suspicion on the part of plaintiffs as to the falsity of defendant’s representations.*”

The Court then proceeds to cite those cases wherein the parties actually did rely upon false representations and made no personal investiga-

tion, and therefore the court held the *mere opportunity or existence of opportunities for investigation* do not bar them.

*These are the only exceptions to the authorities which we have cited, and the authorities cited by us are conclusive of the law in this State and the facts in this case come squarely within them and not within the exceptions.*

### THE DUAL AGENCY OF THE COLONIZATION CO.

We make the further point in this connection that the California Colonization Company became, as they had a right to become in this case, the agents of the plaintiff herself in this very transaction. In other words, they were authorized to find a purchaser for \$75,000 and no less. She agreed with them that she would pay \$75,000 for the property if they could not obtain it for less. And she actually placed in their hands a \$5000 check to secure her agreement *to take it for that sum if they could not obtain it for less.* She thus made them her agents to represent her in the transaction of the business. With them she had agreed to pay the price and had deposited her money to secure the agreement, but they were not to communicate this fact to the defendants and have the bargain closed as clearly appears from the receipt itself, but were to withhold this information and endeavor with her, and they did endeavor with her and her agent, to beat the defendants down in their price. They, therefore, in this case (where they had a right to, because there were no confidential relations existing between them and the defendants for they

were mere middle-men) actually represent the plaintiff. In other words, they became agents for both parties.

In fact, and by way of parenthesis we might state that it is our firm belief under the law that so far as Miss Garwood was concerned they were her agents in the first place.

When she approached them they had no contract on the property, but, after talking with her and hearing her express a desire to obtain a tract of land such as they described this to be to her, they at her request phoned to the defendants and obtained permission to find a purchaser for the property for \$75,000. The fact that they were to be paid their commissions by the defendants, would not change the rule at all. Thus, it has been held that even though a mortgageor pays the fees for preparing mortgages, etc., the attorney is frequently held to be the agent for both parties to the transaction. However, there is no question that the agents in this case became her agents after she had agreed to buy at defendants' price and had made her \$5000 deposit. Under the circumstances, their knowledge of the facts became her knowledge, and if there was any information which they had about the property or facts of which they had reasonable notice it was their duty to disclose them to her and the law makes all their knowledge her knowledge and estops her from denying notice and knowledge. If they had committed any fraud in the transaction as they were her agents their fraud was her fraud and became her fraud by the relationship she assumed.

She knew they were middle-men, or in a limited sense agents of the defendants, and when she consented that they act for her too, then she is estopped from denying that their notice and knowledge was not her notice and knowledge.

See:

*2 Corpus Juris*, 872;

*Pine Mt. Etc. Co. v. Bailey*, 94 Fed. 258;

*In Re Manufacturers Sales Co.* 209 Fed. 629.

In the case last cited on page 654 the Court says:

“A principal who knows that his agent is also acting as agent for the party adversely interested in a transaction with him and yet consents that he may act as his agent is estopped from denying the notice and knowledge which the agent has during the transaction.”

There are many other cases to the same effect.

In *94 Fed. 260 Supra*, the Court cites:

*Fitzsimmons v. Express Co.* 40 Ga. 330-336.

(This case is also found in the 2nd American Reports, page 577).

There it was held that the agent of an express company became the agent of the consignee because he, at the request of the consignee, undertook to safely keep the package sent for a short period after he received it. During this time the package was lost. While he was the agent of the Express Company in the transaction, the court held that he became the agent of the other party and the company was exonerated from liability.

*Finally we find the plaintiff relying upon several things other than the representations of the alleged agents.*

1. *She relied upon the inspection of the premises and her inquiries of the defendants, both of which inspection and inquiries, disclosed the facts that if the agents made the representations she claimed, the most material of those representations were wholly untrue. Therefore, she did not rely upon these representations and if she tried to, the law would not permit to do so.*

2. *We find that what she did rely upon was the representations made by Mr. Brown and the others in connection with him, that if she would purchase the property, put on it more stock and permit him to run it according to his ideas, she would make a good profit. And, also, according to the representations made by him, and possibly by Dike, that the property could be subdivided and sold in the year 1915 at a good profit. Nobody would question the facts that such representations, if made, were wholly matters of opinion. They applied wholly to the future and to changed conditions and were opinions as to what might be done in the future. No one can rely upon these things and if he does rely upon them he cannot recover.*

These are the things upon which plaintiff actually relied. It will be recalled that Mr. Brown told her that he considered this one of the best dairy farms in the State of California, and so did everybody else, and so it is. It was from such representations as these that the plaintiff has now built up the superstructure of the alleged

misrepresentations upon which she is now trying to convince the Court that she did rely.

3. *The plaintiff did not rely upon any representations.* She did make an investigation for herself though in a most careless, inattentive and indifferent sort of a way and she was told the truth about the property fully and fairly by the defendants. They knew that it was worth every cent that they were asking for it, and if the court could have seen their demeanor on the stand, the court would quickly realize that they were simple minded honest industrious men, and believed in fair dealings in every way.

What plaintiff did rely upon particularly was her agent Dr. Ramos, and she had him make a careful specific, minute and exact investigation of the entire transaction. *This, of course, is absolutely conclusive of the case at bar, unless the plaintiff can avoid this conclusive bar by the attempt to show an alleged bribing of her agent.*

The fact that plaintiff has been deliberately false in the statement of material facts from the beginning to the end of this transaction, of course, renders her testimony of no value, but being more charitable in the matter than the facts will warrant let us assume that she has forgotten from time to time the details of the transaction and is obsessed only with the thought that she has through her mismanagers been unable to make as great a profit as she expected and that, therefore, she must have been cheated. Hence, every possible thing that she can think of, or that she thought of during the time of the negotiations or that Brown can now suggest to her has been twist-

ed or contorted into misrepresentations of fact, or as circumstances which it is hoped might enable her to obtain a judgment for damages in this case.

Surely in that class must be placed the effort to represent to this Court that Dr. Ramos *was bribed*. If this Court could have seen the demeanor, the manner and the almost conclusive indications of fairness, honesty and square dealings disclosed by Mr. Crane when he was on the stand, it would have seen at a glance that Mr. Crane who is the one who actually agreed to the division of the commission with Dr. Ramos, would not be a party to any fraud or any attempt to do that which was not honorable and right.

And let us see what the facts were:

The plaintiff testified that she had frequently requested the California Colonization Company to divide the commissions and that they had refused to do so; that she had made this request to them personally, and that they had refused it.

Now, if it should be apparent to the court that before the Colonization Company agreed to divide the commission, she had actually decided to buy the property, then the subsequent agreement to divide commissions with her agent would not in any manner influence her, nor him, because she had already decided. Again, if the agents, pursuant to her repeated demands and strictly in accordance therewith, innocently acceded to her demands and agreed to divide the commissions, assuming that her agent would report the truth to her about it, surely there was no fraud in the transaction in any manner, shape or form, so far

as the defendants or the defendants' agents were concerned. If Dr. Ramos became subsequently faithless to Miss Garwood that is no concern of ours. Though, we could not for a moment reach the conclusion under the facts of this case that the plaintiff was ignorant of the fact that Dr. Ramos was to get half of the commission.

Going back to the proposition that she had already decided to buy before the Colonization Company agreed to divide the commission, we find this clearly proven and an undisputed fact in the case.

Let us take, for instance, the testimony of Charles Weinrich, found on page 336 of the Transcript. In substance he says that in the month of September, 1911, he heard a conversation between Dr. Ramos and Miss Garwood on "K" Street in front of the Turner Hall. That he was walking immediately behind them and knew them. Miss Garwood spoke about buying the place. Dr. Ramos said Dike should pay him a commission, and she answered "Make him do it, my dear, make him do it." That he went around to the office and reported these facts to Mr. Crane. Mr. Crane says at the bottom of page 89 that Miss Garwood had *several times asked him to split the commissions prior to the time that he agreed to do so*, and (page 109) that prior to the time he agreed to split the commissions Charles Weinrich informed him that this demand was going to be made.

Then we find, turning to the top of page 109, a statement of the circumstances under which the agreement was made to split the commissions. Mr. Crane says that Dr. Ramos came out of the

office where he (Ramos) was talking with Miss Garwood and told Crane that they had decided to take the ranch provided they would split the commissions, otherwise they would not take it. So he and Mr. Dike held a meeting of the corporation and voted to do so. Again on page 115, the witness says that Dr. Ramos came to him from the little office where he was conversing with Miss Garwood and said that they would not take the property unless the commissions were divided; that they held a meeting and passed a resolution authorizing a division of the net commissions; that they wrote it on a card and gave it to Dr. Ramos, and that they never tried to conceal the division of the commission.

And this is repeated in another form when he said "We made out a check for Dr. Ramos as the agent of Miss Garwood," but that he could not remember just when the check was made out. Later it appears from the testimony that the money was not paid until after November 1st. On page 116, the witness says *that his impression was that Miss Garwood knew all about it.* At any rate, the fact is that the agreement made for the division of the commission was just what Miss Garwood herself had demanded and which she admittedly sent her agent to demand at the time she deposited the \$5000.

While Mr. Crane's recollection was somewhat uncertain as to the time of payment to Dr. Ramos, yet it is certain therefrom that the agreement to pay the commissions came after Miss Garwood had decided to take the property. Her message to Crane by Ramos was that they had decided to take it provided the commissions were divided.

Turning to Miss Garwood's testimony on pages 176 and 177 of the transcript we find at the bottom of page 216: "On *Monday morning* when he said he would not take off the grain, then I said 'Won't you divide your commission with me because I really can't spend so much money' but he said no, he never divided commissions with anybody, he could not do that—"

Q. Did you ever at any time tell Dr. Ramos to exert himself to get them to cut it down?

A. *I used to say to give me that money*, get them to give it to me, because he said he thought it would be a good purchase, he thought the land would be valuable, and I said "You get them to take off half the commission, because I must have something."

Just what plaintiff meant by the statement "I used to say 'give me that money' " is not quite clear. We have our own impression as to her coming very near stating the truth in this expression, because she undoubtedly did try to get the commissions out of Dr. Ramos afterwards, but whether with success or not, we do not know. That is her own affair, however. But returning to the part of her statement which she did make clear, we find her telling the Doctor to get them to take off half of the commissions, and then adding: *that a settlement was made* and that after the settlement the Doctor said she ought to be ashamed of herself for taking so much time, etc. This was all on Monday morning, September 25th, 1911.

Thus we see that she expressly authorized and directed Dr. Ramos to make a final demand for

these commissions which he did and which were then acceded to and in the settlement which followed she paid \$5000 down and obtained a receipt. She claims that she did *not know that the agents had complied with her demand and had agreed to divide the commissions* and claims that Ramos concealed the fact from her later. An analysis of the testimony shows that she carefully refrained from saying that Dr. Ramos reported to her at the time of making the deposit that they would *not agree to do so*. At any rate and as a part of the same transaction when she directed this demand to be made by Ramos, she put up \$5000 and accepted and countersigned the receipt therefor.

Two things are clear from these facts:

1. That she had made up her mind to purchase the property *before the agents agreed to divide any commissions*.

2. *That the agreement of Dike and Crane to pay a share of the commissions was at her request and on her express demand and, therefore, by every rule and principle of law no fraud or damage of any kind could be predicated on their compliance with her demand.*

Frankly, we believe that plaintiff knew all about the agreement to divide the commissions, but this is so immaterial that we do not care to discuss it, except to say in this connection, however, that it appears that the commissions were not actually paid until after the sale was completed on November 1st. We find that in October Miss Garwood was told by Mr. Brown that Dr. Ramos *had actually received the commissions*, and that she

then demanded the commissions of the Doctor, but that he denied that *he had been paid the commissions*. As a matter of fact, Ramos had not *received* the commissions and if the alleged conversation occurred, he truthfully denied that he had received them. We do not believe that he then said or intimated, or that she questioned the fact which she surely well knew that there had been an agreement to pay one-half of the commission. *The fact in dispute*, (if there were any disputes) was whether or *not he had then received the commissions*. And he had not, and if asked about it, he undoubtedly told her so and became indignant about the inference that *he had been paid*.

Whether or not after the sale was completed and he did get the commissions he declined to pay them to her and concluded that he had actually earned them by his services in investigating the matter for the plaintiff, as he clearly had, and, therefore, refused to give them up is something with which we have no concern, nor has the Court.

Our Civil Code says: "He who consents to act is not wronged by it." Sec. 3515.

Surely this rule can be reduced sufficiently to include: "He whose demand is complied with, cannot claim that he was injured by such compliance."

At pages 181 and 182 of the transcript the plaintiff states that she was informed by Mr. Brown in October that Dr. Ramos had received a part of the commissions for the sale of the land. That was prior to the execution and delivery of the deed. The plaintiff seems to have become quite indignant concerning this charge against

her agent and she wired the doctor to come to her and he came and at once denied that he had received any commissions. This is all the investigation she made. She had been informed several times that the Doctor had been paid a commission but she did not deem it of sufficient importance to make any inquiry of Dike, or Crane, or the defendants, each of whom she saw several times before the sale was completed. She was content to take the Doctor's word.

To us there seems that there is nothing to plaintiff's case, for she has failed to establish any one of the essential elements which the law *says must in a case of this kind be established by clear and convincing testimony.*

## VI.

*The final element to be so established by plaintiff is that she acted on the alleged false representations to her damage.*

The proof is overwhelming that the property could have been sold at the time of this contract in the open market for the full price paid; that between the time of signing the contract and the deed the defendants were offered the same price by another party (see Trans. page 356) and that within two or three months after the purchase Mr. Charles F. Silva, who was ready, able and willing to do so, offered to buy the property from plaintiff for the full amount paid by her. If the plaintiff may not have been able to handle the property to advantage subsequently is no one's fault.

The testimony that the property was worth the

full amount she paid for it, and was worth that at the date of trial in spite of the depressed condition of the realty market is overwhelming. So far as the witnesses in this respect are concerned we not only have a preponderance in number, but also our testimony is that of the most reliable people in the neighborhood as well as of those best informed. The court will, of course, bear in mind the testimony that all land varies to a greater or lesser extent, but the point to be determined is what would the land have sold for at the time, allowing a reasonable time to find a purchaser, *and the fact that two parties besides the plaintiff were ready and willing to purchase for the full amount; that the defendants had the opportunity to sell to one and the plaintiff to another is surely quite persuasive of what the property would have sold for in the open market.* The plaintiff did not attempt to prove that the land was not worth \$75,000, until after we had closed our case. The only evidence in the case, therefore, is the testimony of our witnesses because it was a part of plaintiff's case to prove her damages.

Now let us see what occurred:

After we had completed our case, the plaintiff, against our protest and objection most strenuously urged and without asking the leave of the Court, or even hinting that leave to re-open the case was desired, (the testimony being taken before a Commissioner) attempted to prove values by certain witnesses. We wish to make this comment on their testimony:

Mr. Redfield owns an adjoining piece, partly within and partly without the levee, similar to

that of the plaintiff. He testified to values of land in the neighborhood, making the values ridiculously low. Thereupon (see page 417 of the transcript) the witness was asked if he would take \$350 per acre for his land and he refused to do so. He was actually offered \$350 per acre and there was present in the courtroom those who were ready, able and willing to pay him that price and who expressly authorized us to make the offer.

So in Mulvany's case. On page 430 we find that Mr. Mulvany, who had a ranch similar in character to the Garwood property was offered by Mr. Hewitt \$250 per acre for it just as it stood and asked if he would take it. He refused to take it unless Hewitt would also take the 300 acres on Coon Creek, but Hewitt said he was speaking of his home ranch, which was similar in character to the Garwood property and on the river. Mulvany answered that he would not sell his home place for *\$250 per acre*.

The reliability of these two witnesses as to value when they are placing a value on somebody else's property of \$125 per acre, and in one case declining to take \$250 an acre and in the other case \$350 per acre for property similarly situated should be quite conclusive, it seems to us.

On this point and in order to show that plaintiff was not damaged to any extent we quote the valuation placed upon this ranch as a whole by the witnesses of defendants, all of whom were and have been for many years familiar with the land and competent to testify as to its market value. These witnesses placed the value as follows:

John Borgman—Tr. p. 323.....	\$80,000
Benjamin Drescher—Tr. p. 320.....	80,000
Chas. Silva—Tr. p. 286.....	75,000
J. B. Thompson—Tr. p. 328.....	80,000
G. A. Wessing—Tr. p. 307.....	80,000
Arnold Zimmerman—Tr. p. 330.....	85,000

It certainly appears from the above testimony as contained in the record that the trial court was justified in concluding that plaintiff had not been damaged by the transaction.

## VII.

The final question in the case is plaintiff's election to rescind and the fact that she is bound by that election.

An examination of the notice of rescission (Tr. p. 49) will disclose the fact that plaintiff therein gave no reasons why she wished to rescind. She did not therein mention or hint that any misrepresentations of any kind had ever been made to her by anybody nor did she give any indications of her ground for rescission until she commenced her suit for rescission. Plaintiff attempts to claim that as the defendants refused to consent to rescinding they are bound by alleged misrepresentations of the agents and herein they confuse express agency with implied agency, express authority with implied authority and notice of alleged misrepresentations with no notice thereof and contracts actually made by agents with contracts made by the principals themselves, and say that because the defendants refused to consent to the rescission that they are bound by all the alleged misrepresentations made by their alleged agents because they accepted the fruits of the transaction.

We have already shown the fact that the alleged agents were middlemen or limited agents merely; and that they did not make the bargain, but that plaintiff and defendants made their own bargain; that the defendants are not bound by any misrepresentations of agents, even if misrepresentations were made——— and that the defendants in this case are not bound for the various and sundry reasons hereinbefore stated.

Besides ratification can only be made after knowledge. For the purpose of the argument passing the point that the contracts having been reduced to writing the defendants are entitled to rely upon the presumption, at least so far as representations of agents are concerned, that the writing included all of the representations and passing for the purpose of argument also the point that the agents had no authority to make any representation, we find here a contract made by the parties themselves and not by the agents, and we further find the well established rule in this State that a ratification can only be made in the manner that would have been necessary to confer an original authority or where oral authority would suffice, by accepting or retaining the benefits of the act with notice thereof. Civil Code Section 2310.

In this case in order to authorize the agents to make contracts and representations in reference thereto their authority is required by the Code, Section 1624 Civil Code, to be in writing. Since their only authority was to find a purchaser and not to make a contract and since the parties made their own contract, the rules contended for by plaintiff do not apply.

In this case, even if the authority could have been conferred verbally, it could only have been ratified after knowledge of the circumstance and acquaintance with the unauthorized acts to be ratified.

“It is a well settled rule that a principal who ratifies the acts of his agent must be made acquainted with the character of those acts and *unless all the circumstances are made known to him the ratification is void.*”

*Billings v. Morrow*, 7 Cal. 171, 174, 175.

“In order to constitute a subsequent ratification of the act by the principal it seems that there must be evidence of previous knowledge on the part of the principal *of all the material facts.*”

*Puget Sound L. Co. vs. Krug*, 89 Cal. 237-243,

See also:

*Maze v. Gordon*, 96 Cal. 61, 65,  
where the Court said:

“I do not think the evidence shows ratification. It is not made to appear that when the letters were written to plaintiff, Hamilton was sufficiently aware of the terms of the sale to enable him to ratify it. The letters show that he knew of a sale and since he was willing to ratify one might infer that he must have known of the particular conditions of the sale. But this is not enough. Before ratification can be *inferred such knowledge must be shown.*”

In the case of

*Galinsky v. Allison*, 114 Cal. 458, 460,  
the court holds:

“*The principal determines for himself what authority he will confer upon his agent and there can be no implication from this authorizing a sale*

of his lands that he intends that his agent may, at his discretion, charge him with the responsibility and duties of a mortgageor."

In the case at bar by authorizing the agents to find a purchaser, the defendants did not authorize the agents in any way to make *any warranties, either of quality or quantity or any other warranties*. The defendants made their own bargain and if the plaintiff was relying upon any warranty or representations of the alleged agents it was for her to so advise the principals.

### ELECTION TO RESCIND

Returning again to the subject at hand, namely: election to rescind. We find the situation is that the plaintiff is barred by her election to rescind and the reason therefor is as follows:

When she gave her notice of rescission no change had been made in the condition of affairs. When she brought her suit for rescission no change had been made which precluded a rescission. Then we have this fact that at the time she gave her notice of rescission and commenced her suit to rescind the *only thing that stood in the way of a rescission was her proof of the alleged fraudulent misrepresentations*.

If, therefore, she has in this case proven that she was defrauded, then she could have made the same proof in the rescission suit. That being so, *her election to rescind, confirmed by the commencement of the suit, is a final binding election which she cannot change*.

The fact that she subsequently and before the trial of that case voluntarily changed conditions

by disposing of some of the personal property cannot effect her election in the premises, but simply defeats the only remedy which was then open to her.

The matter of the rescission of the real property is not necessarily connected with the rescission of the sale of the personal property, but if it were as we alleged in our answer of the rescission suit, *it was her fault and her act occurring subsequently to the commencement of that suit*, which barred her remedy, for the disposal of a part of the personal property was her voluntary act; and if that prevented her from obtaining rescission, it was her own fault.

The general rule that an election is conclusive is stated in

*15 Cyc. 259*, as follows:

“By preponderance of authority the mere commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain the same, is such a decisive act as to constitute a conclusive election, barring the subsequent prosecution of inconsistent remedial rights.”

“An election once made with knowledge of the facts between coexisting remedial rights which are inconsistent is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election.”

*15 Cyc. page 262.*

In our own State our Supreme Court has said:

“When two inconsistent remedies are open to a person he must elect which *he will pursue, and having elected one he is barred from the other.*”

*Parke, Etc. Co. v. White River L. Co.*, 101 Cal. 37.

“It is true that a party having inconsistent remedies may not pursue both, *but must choose between them, and having clearly elected to proceed upon one will be debarred from invoking the other.*”

*Hines v. Ward*, 121 Cal. 115-120.

The court further says that to some extent the doctrine of election proceeds upon a like theory of equitable estoppel, that the inconsistent attitude of a party will put his adversary to some disadvantage. And after citing the following United States decision we will return to the last mentioned suggestion:

In the case of

*Shappirio v. Goldberg*, 192 U. S. 248,

the Supreme Court of the United States said:

“When a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged, by the rescission of the contract. If he chose the latter remedy, he must act promptly, ‘announce his purpose and adhere to it’ ” \* \* \* \* \*

The real question involved in the election of remedies, however, is this:

*Was the remedy open to the plaintiff when she selected it and began her suit?* In this case it was.

Returning to the proposition as suggested in

*Hines vs. Ward, Supra*,

that the election of remedies will depend to some extent on whether or not the defendant will suffer to his disadvantage from the change of position, we call attention to the fact of the differences in damages allowed plaintiff in rescission and the damages allowed in a case of this character, to-wit: Action for Deceit.

In a suit for rescission the plaintiff, if successful, is entitled to have the transaction set aside; to return the property she bought, and to get her money back, together with incidental damages for loss of time, etc. The parties are then placed in *statu quo*.

In this action for deceit, the contention of the plaintiff is that if any acre of that land is not worth \$125 she is entitled to the difference between what each acre is worth and the \$125, and that it does not matter if the whole ranch is worth the \$75,000; that it would not matter if 250 acres of the ranch were worth \$75,000, and that she was getting all that value; that she could keep that value and still make the defendants pay the difference between nothing and \$125 in some instances and \$50—\$60 or \$70, or \$80 an acre and \$125 in other instances.

Thus, according to the plaintiff's theory of the case, she is entitled to retain this *ranch worth \$75,000* and make the defendants pay her for 150 acres of land at the rate of \$125 per acre and also for 200 acres at the rate of \$45 per acre—about \$30,000 in all.

In the action for rescission all that she would have been entitled to in reference to these same matters would have been to return the ranch worth \$75,000 and get her \$75,000 back.

While, according to her theory in this case she is entitled to retain the ranch worth \$75,000 and get \$30,000 besides. Is there a difference? Would defendants suffer by the changes in the remedies? Had the ranch been returned to the defendants they could have sold it for \$75,000 and would they have been out anything? They could have sold it and they would not have been out anything in the transaction. If plaintiff keeps the ranch and makes them pay \$30,000 then she gets their \$75,000 ranch for \$45,000. Are the remedies inconsistent?

As to the matter of damages, we cite the case of

*Sigafus v. Porter*, 179 U. S. 116-123,

on the measure of damages, and we could cite authorities from all over the United States to the same effect, but that is a California case decided by the United States Supreme Court and we submit that to establish the rule.

The measure of damages in an action for deceit in the sale of property is not the difference between the value of the property as it proved to be and as it would have been if as represented, but is the difference between the real value of the property at the date of sale and the price paid, with interest thereon, together with such outlays as were legitimately attributable to defendant's conduct, since the damages are limited to the direct pecuniary loss, if any, of the plaintiff, *and will not cover the expected fruits of an unrealized speculation.*

*Sigafus v. Porter*, 179 U. S. 116.

## SALE EN MASSE.

Inasmuch as counsel for plaintiff asserts so strenuously that the sale of this property was by the acre instead of as a whole, let us examine the evidence to see if the trial court was not justified in concluding as it must have concluded, that the sale was made of the ranch in gross.

On page 99 of Transcript, Brown, a witness for plaintiff in answer to a question whether the sale was in gross, replied, "it was to be sold as a total, providing they took the stock." Subsequently he stated that the contract was for 600 acres at \$125 per acre but he is referring to the option which had expired, and not to any matter connected with the sale to plaintiff. Speaking of the contract with Miss Garwood he states at page 102 of Transcript: "I would not swear whether the contract said so much an acre or \$75,000."

Mr. Crane, a witness for plaintiff, states at page 105 of the Transcript that he cannot swear that the land was put up to plaintiff by the acre.

Mr. Dike, a witness for plaintiff, states at page 261 of the Transcript that the ranch was sold as a whole.

The purchase price was given by the Scheibers to Mr. Dike as \$75,000 and not \$125 per acre. No price by the acre was mentioned.

The above named witnesses were all the witnesses examined at the trial concerning the question of whether the ranch was sold by the acre or in gross with the exception of the plaintiff and she is the only one who testified that it was sold by the acre.

The documentary evidence in the case shows that it was sold as a whole. The circular (Plaintiff's Ex. 5) gives the price as \$75,000 for the whole ranch, no price per acre being mentioned.

The receipt given to plaintiff by the Colonization Company (Defendants' Ex. B) places the price at \$75,000, no price per acre being stated.

The contract of Sept. 27 (Defendants' Ex. A) gives the price as \$75,000, nothing whatever being said about a price per acre.

In addition to this convincing testimony on this point, we desire to call the attention of the Court to the fact that in all the pleadings recited by the plaintiff in which she sought a reduction in the purchase price she did not ask to have the price per acre reduced. She sought to have the price of the ranch as a whole reduced.

Now, just a word further about the quantity of land in the tract. Counsel for plaintiff has sought to make it appear that a part of the ranch had been washed away and that a part lay in the old channel of Feather River. The evidence does not show any such condition. Counsel must base his conclusions on the survey made by Mr. H. H. Jones and the map made by him (Plaintiff's Ex. 2) which was so inaccurate that he did not refer to it in his brief.

In order that the Court may have a clear picture of the ranch as it existed at the time of the sale, we will call attention to the map made by Von Geldern (Defendants' Ex. I). The boundary throughout is marked by a broad line. The old levee lies directly to the west of the county road

and the new levee extends farther to the west and along the river until it reaches the "cut-off," and then along the east side of the "cut-off." This new levee was not constructed at the time of the sale. The artificial channel or "cut-off," which has been constructed since the ranch was sold, extends across the narrow portion of the place where the words "proposed channel" are written. The length of this artificial channel across the ranch is short, but by referring to the map marked "Defendants' Ex. J" the Court will observe that it extends across other lands to the south of plaintiff's. The old channel of Feather River is shown on both maps.

Mr. Jones testified that within the exterior boundaries of the ranch there were 535 acres and that there were 73.8 acres lying between the old and new levees, as they existed when he made the survey in April, 1915 (Trans. p. 86). The artificial channel at that date had been completed and the new levee extended along the east side of it where it is marked "new levee" on the map.

On cross examination it developed that he did not survey the exterior boundaries of the ranch. At page 87 of the Transcript he stated: "I did not make any survey of the land lying west of the present artificial channel of Feather River." He gave as his reason that the water in the river at that time was high. By comparison the Court will find that the land on the west of the artificial channel which Jones did not survey contains about the same acreage as that between the old and new levees. Adding this omitted acreage to what he stated was east of the new levee and we have more than 600 acres in the ranch.

In July, 1915, Von Geldern surveyed the ranch, including the land lying west of the artificial channel, and found that the acreage was 609.9 acres. At that time the land lying between the two levees had an elevation of 14 feet, and the land lying between the old channel and the artificial cut had an elevation of 12 feet above the old river channel. From this survey it does not appear that the land had been washed away as stated by the witness Mulvany; but it does appear that there was not a shortage in acreage as contended by plaintiff and that the trial court was justified in concluding that there had been no misrepresentation as to acreage.

#### A WRITTEN CONTRACT SUPERCEDES ALL PRIOR NEGOTIATIONS.

The contract was in writing and it is a question what representations, if any, contrary to the terms thereof that plaintiff can rely upon. This is, in effect a warranty that the property is of a certain character. Our Supreme Court has frequently held that a contract having been reduced to writing any evidence of any warranty being contained therein can be presented.

*Johnson v. Powers*, 65 Cal. 179-181;

*Kullman Sals Co. v. Sugar, Etc. Co.* 153 Cal.  
731-32-33.

In both of these cases it is held that a warranty cannot be shown by parol and that when a contract has once been reduced to writing the parties are presumed to have put in the contract every material term, representation or agreement upon which they rely.

## THE MEANING FOR THE WORDS “MORE OR LESS.”

The Supreme Court of this State in the

*29 Cal. page 178-179,*

clearly states the law as Mr. White stated it, in reference to the words “about” or “more or less” or equivocal language in a Deed as follows:

“ ‘containing about seventy-two acres,’ or any equivalent language in a deed is mere matter of description, and of but little if any account for that purpose even, and always gives way to courses and distances, which in turn give place to metes and bounds. Hence, where land is sold by metes and bounds, concluding with a statement of the number of acres, a mistake as to the number of acres affords no ground of action by either party against the other, unless it be made to appear, beyond controversy, by clear and positive testimony, that quantity constituted one of the principal conditions of the contract, and did not operate merely as an inducement to the purchase. *Marvin v. Bennett*, 26 Wend. 169; 8 Paige, 312. The expressions used in such cases ‘about so many acres,’ or ‘so many acres, more or less,’ being openly indeterminate and uncertain show that they are not of the essence of the contract, and that reliance, so far as quantity is concerned is placed entirely upon the description by metes and bounds; so if it should, upon an after computation turn out that there is a greater or less number of acres than stated, there can be no recovery for the excess or deficiency, as the case may be, especially where, as in the present case, the complaining party has had every opportunity, by the exercise of ordinary vigilance, of guarding against any mistake in that respect. *Marvin v Bennett*, *supra*; *Northrop v. Sumner*, 27 Barb. 196; *The Morris Canal Company v. Emmet*, 9 Paige, 168.

“But even assuming that it did amount to such a misrepresentation on the part of the defendant as to the quantity embraced within the boundaries given by him as would, under some circumstances, entitle the plaintiffs to relief in a Court of equity, we think that such circumstances are entirely absent from this case and that any loss or injury sustained by them is to be attributed to their own negligence and *Laches*. They had the means of ascertaining the true quantity at hand, either by an inspection of the surveys and maps in their possession, or by visiting and inspecting the premises themselves which were in the immediate vicinity and as accessible to them as to the defendant. They not only did not resort to either of those sources of information, but they did not even take the precaution of asking the defendant as to his accuracy of his estimate of the quantity. Having thus failed to exercise even the most ordinary care and diligence, a Court of equity will not listen to their complaint. 1 *Story's Eq. Juris.*, Sec. 200).”

*Board of Commissioners vs. Younger*, 29 Cal. 178-179.

## EXCEPTIONS TO EVIDENCE.

The plaintiff noted five exceptions to the ruling of the court on the admission of evidence during the trial of the case, and the ruling of the court being against her she assigns such rulings as errors on this appeal.

The first, *Number Three*, is found at page 286 of the Transcript where the witness Silva was asked the market value of the land as a whole on Nov. 1, 1911, the date of the deed to plaintiff. This certainly was a proper question and the court did not commit error in permitting it to be answered. Plaintiff bought the ranch as a whole

and if it was worth what she gave for it she was not damaged.

The same may be said of exception *Four*, page 286, and exception *Seven*, page 307.

Exception *Number Six*, page 303, was made to the introduction in evidence of a warrant for \$5,106.43, dated Dec. 30, 1911, issued by Reclamation District No. 1001 to Isabelle Garwood.

Plaintiff claimed in her direct examination that she did not know that the land was in a Reclamation District. The abstract of title delivered to her indicated this fact. She also testified that she was to get \$5000 back because the levee was constructed. This warrant was offered in evidence to show that she did get the \$5000 back and that the ranch actually cost her \$5,106.43 less than the purchase price named in the contract. The court certainly committed no error in permitting this warrant to be introduced in evidence.

Exception *Number Five*, found at page 302 of the Transcript, was taken to the admission in evidence of a certified copy of the Judgment Roll in the action of Isabelle Garwood against L. M. Curtis et al. The reason for the introduction of this document was stated to the trial court at the time that it was introduced (Tr. p. 302). Plaintiff testified that she did not get 600 acres of land, yet by her verified complaint she quiets title to the tract which she purchased from defendants, consisting of 609.9 acres, the description of the tract being the same as contained in her deed from the defendants, and also by courses and distances, the latter being an improved description.

Surely the trial court in view of the contention and testimony of plaintiff committed no error when it admitted this evidence.

Exception *Number One* is a general exception to nearly everything that the trial court did, but is directed to the contention of plaintiff that the decision is unsupported by the evidence and is contrary to the evidence.

Under the evidence in this case as contained in the Transcript and as referred to in this brief, we submit that the trial court was fully justified in concluding that plaintiff had failed to prove her contentions, and that its decision was supported by the evidence and was not contrary to the evidence. There may have been some conflict in the evidence but under the well established rule of this and other courts a judgment will not be reversed on conflicting evidence.

While discussing the exceptions of plaintiff we desire to call the attention of this Court to the statement made by counsel in his assignment of errors at page 450 and 451 of the Transcript. Counsel states: “and counsel for plaintiff then and there stated to the Court that he desired the Court to render findings when making his decision, and then and there counsel for plaintiff requested the said Court. Honorable Wm. H. Sawtelle, Judge presiding, to make findings of fact at the time he rendered his decision in said action. The said Court, Honorable Wm. H. Sawtelle, Judge presiding, then and there refused to grant the request of plaintiff, and stated that he would not make findings of fact in said action, because of the fact that the request for findings had not

been made before the commencement of the trial. To the Court's said action in refusing the request of plaintiff for findings of fact, the plaintiff then and there duly excepted."

We submit that the above is an extravagant *statement* of counsel. There is not a line in the record showing that plaintiff made such a request or that the Judge made the ruling stated or that an exception was taken to such ruling.

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#### REVIEW AND COMMENT ON AUTHORITIES CITED BY PLAINTIFF.

Practically all of the cases cited by counsel for plaintiff from page 25 to page 32 of his brief deal with actions where the facts established a shortage in acreage in the quantity of land sold. They are not applicable to the case at bar because here there was no shortage. Plaintiff received title to 609.9 acres.

Taking up the cases in the order cited we have  
FIRST:

*Harrell v. Hill*, 19 Ark. 102.

In this case the sale was in gross under a representation that there were 180 acres in the tract, whereas the tract was short 84 acres. At all times the owner of the property asserted that there were 180 acres in the tract, while for years he had given in his assessment to the County Assessor that it contained but 120 acres. The representations made by the owner of the property were known to him to be false at the time they were made and they were made for the purpose

of effecting a sale of the property. As above stated, there was no shortage in the case before this Court. Plaintiff received title to 9.9 acres more than she supposed there were in the tract.

## SECOND:

*Howes v. Axtell*, 74 Ia. 400.

This was a sale of a tract of land as a whole on the representation of the owner that there were 84 acres in the tract, whereas the jury in the case found that there were only 75.79 acres, and that the owner had falsely and intentionally misrepresented the facts to the purchaser. There was a conflict in the testimony on this point and the judgment of the lower court was affirmed.

## THIRD:

*McComb v. Gilkeson*, 135 Am. St. Rep. 944.

This was a sale of land as a whole upon a representation that it contained 245 acres. There was an actual shortage of ten acres in the tract.

## FOURTH:

*Salyer v. Blessing*, 151 Ky. 459.

In this case the owner guaranteed to the purchaser that there were 1000 acres in the tract, whereas there were only 697 in the tract. The owner denied the quantity but the trial court found against him on the evidence and the appellate court sustained the decision. The lower court in disposing of the case found that the evidence showed that Salyer, the owner, represented and guaranteed that the boundary sold and intended to be conveyed by the deed, contained 1000 acres, when he knew that it did not. The sale was by

the acre.

FIFTH:

*Cawston v. Sturgis*, 29 Or. 331.

Here there was shortage and gross misrepresentation by the seller as to the number of square feet contained in the lots. The point was raised that the defendant did not intend to deceive the purchaser but the jury found against such intention, and there being a conflict in the evidence the verdict of the jury was not disturbed.

SIXTH:

*Tyler v. Anderson*, 106 Ind. 185.

Here, also, according to the complaint, there was a shortage in the tracts of land conveyed. The sale was by the acre. Anderson, the owner, represented to the purchaser that there were 240 acres in one tract and 80 acres in the other tract, and the purchaser paid for the land on the strength of such representations. Afterwards it was found that there were only 235.10 acres in one tract and 77.40 acres in the other. The owner, at the time she made the representations, knew that they were not true. This case was decided on demurrer but many points in the decision sustain the contentions of defendants in the case at bar.

SEVENTH:

*Estes v. Odom*, 91 Ga. 600

Here again there was a shortage in acreage. Estes represented the tract to contain 41.25 acres. He knew at the time that it contained only 33 acres. It was sold by the acre. The tract origi-

nally contained 41,25 acres, but prior to the purchase of Odom, Estes sold seven or eight acres to his brother. There was no question but that the fraud was committed. In addition Section 2642 of the Code of that State provided that "In the sale of lands, if the purchase is per acre, a deficiency in the number of acres may be apportioned in the price."

#### EIGHTH:

*Kell v. Trenchard*, 142 Fed. 20.

This, counsel for plaintiff states, is one of his best cases. What comfort he can get from it we are unable to see. The facts in that case are altogether different from the facts in this case as shown by the evidence. It would require much time and space to recite all the facts in the Trenchard Case, but the following are the main ones:

K, the owner, gave O an option for 90 days upon certain property fully described, consisting of lands, lumber plant, etc., also certain standing timber, described in the option, which consisted of not less than 35,000,000 feet. The purchase price was \$60,000.00, of which sum \$40,000 was to be paid in cash and the balance by note. Afterwards, proposed purchasers met K, the owner, with his agent, and K informed them that his agent would show them the property. They were driven over the land, or what they supposed to be the land, spending two days and covering some 20 miles. The agent represented that K owned the lands around which they circled, and in addition that he owned timber outside the boundaries pointed out. The timber was estimated at 40,000,000 feet on K's land. Afterwards the pro-

posed purchasers sent their timber expert to the land who was met by the same agent of the owner, and he went over the supposed boundaries again. The agent of the proposed purchasers estimated the timber on the land shown him to be 32,000,000 feet. The purchasers then decided to and did take over the property. Afterwards they discovered that the boundaries of the land had not been correctly pointed out to them by the agent of the owner and that there were only 8,232,100 feet of timber on the land owned by K., the remainder being on land owned by other parties.

There was glaring misrepresentation and fraud here while these elements are entirely absent in the case at bar.

The foregoing cases have been cited by plaintiff to show that the trial court committed error in admitting evidence showing that the ranch was sold as a whole. We submit that there is nothing in any of the cases tending to show that such error was committed.

The boundaries of the place were correctly pointed out by all the defendants. The plaintiff was told on several occasions by the defendants that they did not know how many acres there were in the ranch; that they never had it surveyed. The survey was made after the place was sold by Engineer Von Geldern, who states that he ran the lines around the exterior boundaries of the ranch established the fact that there were 609.9 acres in the tract, so there was no shortage in acreage.

The cases cited by counsel for plaintiff from

pages 80 to 113 of his brief are given for the purpose of showing that the sale was by the acre and not in gross. Under the facts in this case as presented by the evidence we can not see what difference it makes to plaintiff whether the sale was en masse or by the acre, except that if it had been by the acre at the price mentioned by her the purchase price would have been some \$1237.00 more than she paid, because there were 9.9 acres of land more than she thought he was getting.

In *Lang v. Merbach*, 105 N. W. 415, there was a shortage of 43.92 acres out of a total of 382.78 acres. The land was sold at \$35 per acre, or \$13,397.

In *Paul v. Swears*, 122 N. Y. S. 740, there was a shortage of 8 acres out of 48 acres. The sale was made with the knowledge of the owner that the farm did not contain over 40 acres, and under his representation that it contained 48 acres.

In *Landrum & Adams v. Wells*, 122 S. W. 213, there was a shortage of 53 acres out of 157 acres. The land was sold by the acre, and the owner knowingly misrepresented the quantity of land.

In *Emerson et al. v. Stratton*, 58 S. E. 577. there was an excess in acreage of 119.69 acres. As to one of the owners it was held that the sale was in gross and that he could not recover for the excess; as to the second owner the court expressed no opinion, except to say that she had commenced action against the wrong party.

In *Hall v. Graham*, 72 S. E. 105, the tract of exactly 90 acres was sold by the acre and it was short seven acres. The sale was made under a

deed containing general warrantees.

In *Gatis v. Buttrill*, 149 S. W. 347, there was a shortage of 39.43 acres out of a total of 573.43 acres. The sale was by the acre and under the representations of the owner that the tract contained 573.43 acres.

In *Rathke v. Tyler*, 111 N. W. 435, there was a shortage of 6.44 acres out of 100 acres. In discussing the case the court said: The main controversy is with reference to the recovery of the shortage in the quantity of land sold. Some question is made in argument as to the accuracy of the survey; but an examination of the record has satisfied us that the tract described in the deed contains but the acreage as computed by the surveyor. It will be noted that the description is followed by the words, "containing one hundred acres, more or less." *These words indicate a sale in gross even though the price stated be an exact multiple of the number of acres mentioned.*

This rule, however, was overcome by the evidence offered showing that the sale was made by the acre.

In *Boggs v. Bush*, 122 S. W. 222, there was an actual shortage of 12 acres out of 90 acres. The owner stated to the purchaser that he had the land surveyed and that it contained 90 acres. The court claimed that the sale was by the acre but the court said it was immaterial whether the sale was by the acre or in gross; there was a shortage and plaintiff was entitled to recover.

In *Brown v. Gookum et al.* 170 S. W. 803, there

was a shortage of 1264.1 acres of land which was sold at \$2.00 per acre. The court gave judgment for \$2,528.20 as a result of this shortage, the owner having knowingly and fraudulently misrepresented the acreage.

In *Lenoch v. Goss*, 157 Iowa, 314, there was a shortage of 17 acres out of 111 acres and the sale was made by the acre. The evidence showed fraud and misrepresentation on the part of the owner as to the number of acres contained in the tract.

*Epes v. Saundus, et al.* 109 Va. 99. Here the court held upon the evidence produced that the sale was by the acre and there was a shortage of 22.1 acres. The court did not hold that the sale was by the acre because the total purchase price, \$2750, was a multiple of the number of acres represented in the tract because it was not a multiple. The holding that the sale was by the acre was based upon oral testimony.

*Wardell v. Birdsong*, 115 Va. 294. This sale was en masse by the terms of the contract. There was a shortage of 105½ acres out of 200 acres which the owner of the land stated the tract contained.

All the above cases have been cited by plaintiff to show that the sale of this ranch was by the acre. In other words, she contends that because 125 is contained into 75,000 just 600 times, that it is conclusive proof that the sale was by the acre. As we before stated it really makes no difference whether the sale was by the acre or en masse for there was no shortage in the quantity of land. However, the sale could not have been by the acre because it was not known how many

acres there were in the ranch. The plaintiff was told by each of the defendants on several different occasions that they did not know how many acres there were in the ranch; that they never had it surveyed. Surely this was sufficient to cause an investigation on the part of plaintiff if she had been buying by the acre.

It is impossible with the limited time at our command to examine all the authorities cited by plaintiff and we have not attempted to do so. We have selected at random from the cases cited by her in support of her contentions with the view of presenting to the court the facts from those cases in order that the court may compare them with the facts in the case at bar. In regard to the cases unnoticed by us we feel confident that an examination of the same would show nothing more than is shown from the above cases examined.

The cases cited from 119 to 139 of the brief of counsel for plaintiff relate to the question of agency. Undoubtedly all of them are good law when applied to the facts in each particular case. On this subject we are content to rest the case on the evidence and the cases cited by us.

On pages 173 and 174 of the brief of counsel for plaintiff he cites cases on the question of "confidential relations." All the cases cited are good law and we will concede that much. The trouble is the facts stated in those cases are not applicable here.

Again we affirm that the judgment of the trial court was supported by the evidence and was not contrary to the evidence. The plaintiff claims

that she was deceived by the following alleged representations of the defendants:

First: That there was a shortage in the quantity of land conveyed. This claim was disproved by the survey of the Engineer Von Geldern.

Second: That the boundaries of the ranch were not correctly pointed out to her. This claim is disproved by the testimony of the three defendants, the witness Dike, and the documentary evidence in the case.

Third: That all the land was subirrigated. This was an afterthought on her part for it did not occur to her until about the time she filed her amendment to her complaint. She did not mention it in the rescission suit; she did not mention it in the suit filed in the Superior Court of San Francisco; she did not mention it in her original complaint in this action. She discovered it about the time she filed her amendment some 4 years after she took possession of the ranch. However, the claim is disproved by the defendants and other witnesses who state that they never told her that any of the land was subirrigated.

Fourth: That all the land was clear and level. This was disproved by her view of the place. She was told that the land lying between the *old* levee and the river was used for wood and she asked the defendants if there was any market for wood. She could see this wood land from the road driven over by her when she examined the ranch and she was invited to go up on the levee and look at it more closely. Her excuse for not going up on the levee was because she had a lame ankle, but all the defendants stated that she was

not lame and that she walked with them about the yard and buildings.

Fifth: That no part of the land was subject to overflow. This claim is disproved by two of the defendants who told her that the land overflowed when the levee broke and that the back part of the land overflowed when the water backed up from the Sacramento river.

Sixth: That the land was represented to her as containing 600 acres of first class alfalfa land. There was no evidence to substantiate such claim, and plaintiff knew from her own observations that much of the land was not in a condition to grow alfalfa.

Seventh: That at least 200 acres of the land was not worth more than \$60.00 per acre. All of plaintiff's witnesses placed a valuation of more than \$100 per acre on this tract alone.

That more than 70 acres of land was beneath the channel of a navigable river. There was no evidence of such a fact except partially from the witness Mulvany, and this is denied by the defendants and the survey of the engineer shows that it was not a fact.

Eighth: That plaintiff has been damaged to the extent of more than \$21,000.00 which she has had to pay as Reclamation Taxes. Such taxes are always apportioned according to benefits and the presumption is that her land has increased in value by the expenditure of such assessment.

Ninth: That she, in purchasing said land, was guided by the advice of her proposed husband, F. I. Ramos, and that he was bribed. We

have fully covered this point in another portion of this brief and the evidence shows the claim to be untrue.

Tenth: Several other matters are claimed by plaintiff, but there was sufficient evidence to support the decision of the court that plaintiff had not been deceived or damaged.

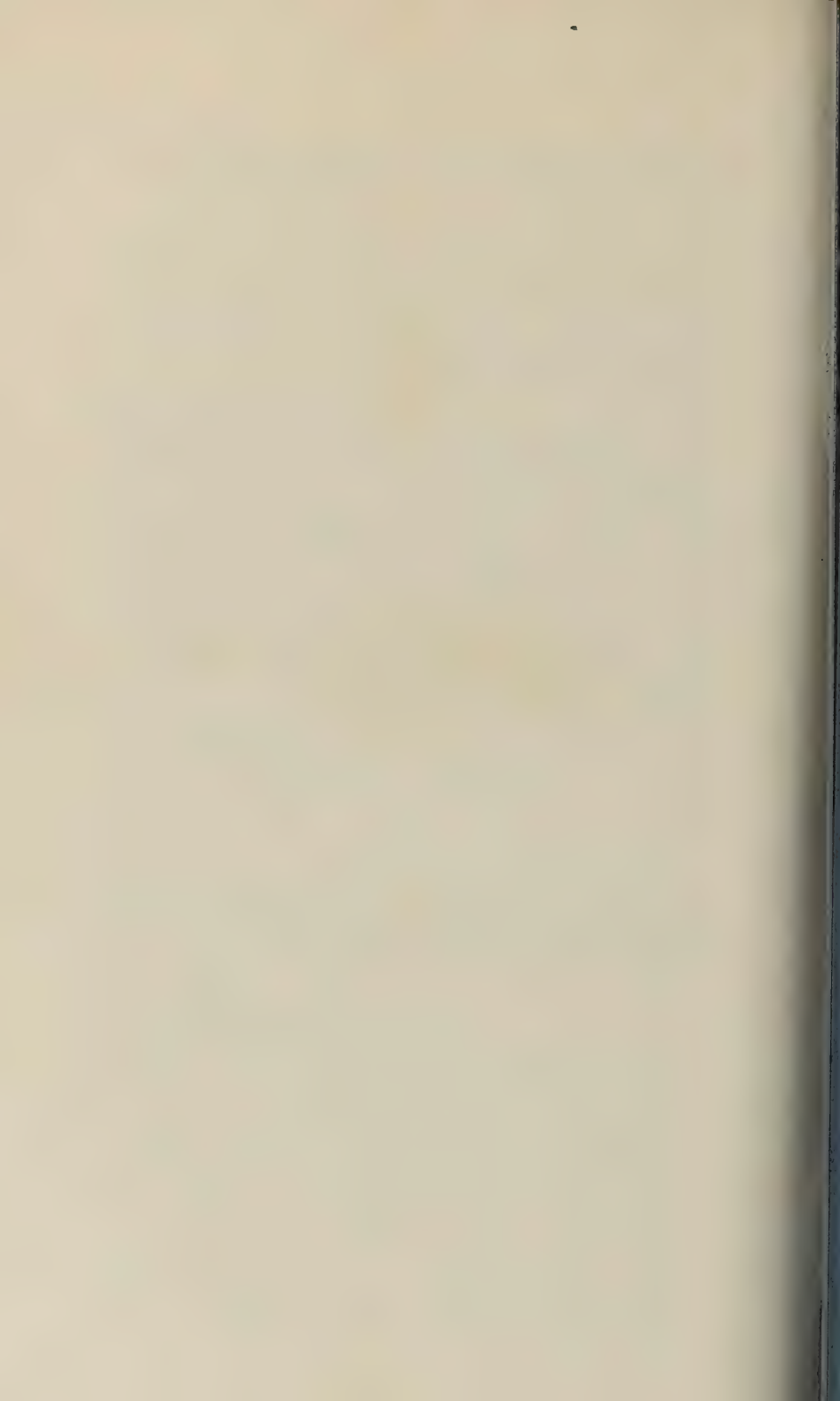
In conclusion we are unable to see how this court can disturb the judgment of the trial court on the showing presented in this case. Plaintiff failed to prove any of the elements necessary to be proven in an action of this nature as recited on page 4 of this brief. No fraud was practiced upon her. She obtained full value for her investment, and we submit that the judgment should be affirmed.

A. H. HEWITT,  
*Attorney for Defendants in Error.*

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*Personal service of the within brief is hereby  
admitted this ..... day of March, 1917.*

LLOYD MACOMBER,  
*Attorney Plaintiff in Error.*



No. 2924.

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—IN THE—

**United States Circuit  
Court of Appeals**

—FOR THE—

**Ninth Circuit**

ISABELLE GARWOOD,  
*Plaintiff in Error,*  
*vs.*

JOSEPH SCHEIBER and MORRIS  
SCHEIBER and JOHN SCHEI-  
BER,  
*Defendants in Error.*

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**SECOND REPLY BRIEF ON BEHALF  
OF DEFENDANTS IN ERROR**

By A. H. HEWITT

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*Filed this ..... day of March, A. D. 1917.*

*FRANK D. MONCKTON, Clerk.*

*By ..... Deputy Clerk.*

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*Defendants in Error.*

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### Second Reply Brief on Behalf of Defendants in Error

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When this case was orally argued before this Court on the 7th day of March, counsel for plaintiff in error obtained permission from the Court to file a reply brief, and counsel for defendants in error was likewise granted the privilege, if he so desired, of filing a second reply brief.

While, on general principles, we do not deem it necessary to make an answer to the reply brief of plaintiff in error, yet we do not feel that we would be treating our clients or this Court right if we let pass unchallenged some of the statements made by counsel in his reply.

The whole argument of counsel seems to be based upon the idea that this Court should review the evidence and determine therefrom that the evidence given by plaintiff and her witnesses was true and that the evidence given by the defendants and their witnesses was false. In other words, he would have this Court reverse the conclusions and judgment of the trial court, notwithstanding a conflict in the evidence.

While the stipulation shown on page 58 of the transcript prevents us from raising the point that because the questions of fact were determined by the court without a jury, no ruling made upon or in connection with the trial can be reviewed by the court of appeals, yet it does not prevent us from showing that the conclusions and decision of the trial court should not be set aside upon conflicting evidence.

There was a conflict in the evidence upon every material issue raised by the pleadings in this case and the trial court found against the plaintiff and gave judgment for the defendants. In the absence of findings this judgment is conclusive unless there be manifest error in the record, and certainly the duty of pointing out such error, if any, devolves upon the appellant. This she has not done. As stated in our oral argument, there are seven errors complained of by plaintiff,

and she asserts that they are errors because the land was sold by the acre instead of in gross.

Practically all the evidence given in favor of plaintiff on the question of a sale by the acre was given by herself. The evidence showing that the sale was en masse is set forth at page 80 of our first reply brief and it is unnecessary to refer to it again.

We have been unable to find anything either in the opening or reply briefs of plaintiff which points out how or in what manner the trial court committed error in any of the seven rulings to which the plaintiff took exceptions. Instead of presenting an argument on these alleged errors she has urged unfairness and misrepresentation as the basis for a reversal of the judgment of the lower court. Because every acre of the 609.9 acres which she acquired was not worth \$125.00 per acre she claims she was damaged by the transaction. That might be the case if she had been told that fact and had made no personal investigation of the premises herself. She was never told anything of the kind. She did know all about the land between the old levee and the river for she asked about a market for wood; she was asked to go up on the levee where she could have seen the premises to better advantage but she declined. Surely, if defendants were endeavoring to conceal the condition of the land over the levee she would not have been requested to look at it. Several of the witnesses testified that the condition of the land over the levee could be seen from the road along the levee, which plaintiff passed over two or three times while inspecting the ranch and before she decided to purchase the

place. To assert that she was deceived as to the extent of the usable land should be unavailing considering what was told her and what she saw.

We will here note some of the errors made by counsel for plaintiff in his reply brief:

On page one he says: “\* \* They (defendants) positively knew that there were only 450 acres of usable land to the tract, and they knew that plaintiff was going away with the impression that she was getting 600 acres of good land.” This is a statement of counsel not borne out by the evidence. The plaintiff certainly knew that the defendants were not making her a gift of the wood land.

Again on page two of his reply brief he states: “That the defendants knew that this large percentage of land (referring to the land west of the levee) had been lost, and that the tract no longer contained the 600 acres which the old deed called for.” As we stated in our first reply brief, the land had not been lost nor was it under a navigable stream (see pages 82 and 83 of our first reply brief. Again on page two counsel states that they (defendants) bought the land for \$27,000, and 450 goes into 27,000 just 60 times. The deed executed to them called for 600 acres, more or less, and counsel might have said that 600 goes into 27,000 just 45 times. We are unable to see that these assertions show that the trial court committed error.

In several places the defendants are charged with knowingly letting plaintiff leave the ranch with wrong ideas. Just how the defendants knew this does not appear from the evidence. Morris

Scheiber testified that she knew perfectly well that the line went to the river. She ought to have known it after having been told several times by all three of the defendants.

At page four of plaintiff's reply brief counsel would have the Court believe that the property sold to plaintiff by defendants cost them but \$27,000. This statement is somewhat misleading but we will be charitable and say that he probably overlooked the matter of improvements which defendants placed upon the property after they bought it and prior to the sale to plaintiff, costing between fifteen and eighteen thousand dollars (see pages 359 and 361 of Trans.). The statement of counsel that according to the testimony of the witnesses Wessing, Thompson and Zimmerman, there was no change in land values between the time that defendants acquired the land and the time they sold is again misleading for on examination of the testimony of these witnesses at the pages cited the Court will observe that there was a marked advance in value after the reclamation works were started.

Again on page four of the reply brief he states that we have misstated the testimony of the witness Brown. We stand by our statement. On the same page that counsel cites, Brown said, in reply to a question as to whether the land was sold as a whole or by the acre: "Well, it was to be sold as a total, providing they took the stock." It is quite evident that he was referring to the conversation with Miss Garwood. The ingenuity of counsel will not change the record.

At page five of the reply brief counsel again insists that his client did not get 600 acres of

land, and he states: "We know that there is an actual shortage of sixty acres by the positive and undisputed testimony of Mulvany." This statement is somewhat extravagant in its nature, considering the fact that Von Geldern, the engineer, testified (page 303 of Trans.) as follows: "I surveyed the Scheiber ranch July 12th of this year. I knew the original boundaries of that ranch from previous surveys that I have made in that territory, but I based the work of this survey on the description furnished from the suit to quiet title, and followed out the description on the ground, and found it to coincide with the lines as I knew them to be. The lines were exactly as pointed out by the Scheiber Brothers. I wish to correct my statement, as to knowing about one particular line in the bottom line, I was not familiar with that one line, but that holds good as far as the others are concerned; all these lines were also shown me by the Scheiber Brothers and Mr. Zimmerman. I don't know where Mr. Zimmerman resided, but I think he lives in that locality somewhere. I know that he has lived there some years ago. Yes, I made a map of my survey. Yes, the map which you show me is a correct map of the place, as surveyed by me. (At this point the said map is introduced in evidence, and marked Defendants' Exhibit "I.") When I was there surveying, I took elevations of of the land between the two levees close to the new levee, so-called; I took elevations of the land between the new cut of the Feather River and the old Feather River channel. In seeking those elevations, I did not use any regular datum. In order to facilitate matters I assumed the datum and made everything in direct comparison to

that datum. I used the elevation of the water in the river at that time as the base of starting point of that assumption. At that date, the water in the river was not at its lowest stage, it was about three feet above the water mark at that time. I found the land close to the cut, or that portion of the land between the the two levees close to the cut to be about 14 feet higher than the water in the river I just gave you the elevation, the difference between them, the elevation of the old channel, the difference in elevation between the bed of the old channel and the river was 12 feet; it averaged 12 feet pretty well all over the channel. It was 12 feet higher than the stage of the water at that time. I found 609.9 acres within the boundaries of the entire tract.”

This testimony as to the acreage in the ranch is certainly more reliable than the testimony of Mulvany, who admitted that he had not been across the artificial cut for 25 years prior to the trial (see page 153). He explains that he could not get there because the land had washed away; it was in the bottom of the river. This statement is disproved by the testimony of the engineer who states that he “*followed out the description on the ground.*” when he made his survey, and the ground was from 12 to 14 feet higher than the bottom of the river and the water in the river was three feet above low water mark.

Now let us examine the record and note what the “positive and undisputed” testimony of Mulvany was. At page 148 of the transcript this witness said:

“The artificial channel, of which you speak,

was commenced and completed in 1913. Previous to 1913 the main body of the river went around the bend, and when the river was high it went across the bend through the timber, all over it. Since 1891, or 1890, there had been for a number of years an old levee to the east of the cut-off. When the cut-off was made, they put in additional levees and strengthened the old ones. In 1911 during high water, the water spread all over the land outside of the old levee. In high water the boat went straight down instead of around the bend. In low water the boat was compelled to go around. I do not suppose that in low-water times there was any water where the artificial channel is now. I have not been there those times; I have not been on the ground. During all the time the water was high, the water was there in that channel.”

From this portion of the testimony of this witness, so “positive and undisputed,” it appears that before plaintiff bought the ranch and for two years afterwards the river ran *around the bend* in the old channel in the summer time and the boats at that season followed the channel around the bend. This bend is shown on the map of the engineer, Von Geldern, and is marked “old channel (now filled up)” (Defendants’ Exhibit I). If the boats, as witness states, went around that bend in 1911, it is quite evident that the river forming the western boundary of the ranch ran around the bend and that there was not a shortage of sixty or seventy acres, and no such portion of the ranch was located under a navigable stream. There was no dispute but that in high water the river covered the entire ranch

west of the levee at the time the place was purchased by plaintiff, but in low water the river ran around the bend as stated by plaintiff's witness.

The land, however, was not sold by the acre and evidently the trial court so concluded, and its conclusion was justified from the evidence (see page 80 and 81 of our first reply brief).

At page six of counsel's reply brief he objects to a statement made in our first reply brief to the effect that the agent of Miss Garwood was shown the entire ranch, and he states that there is no such testimony in the record. It will be recalled that Miss Garwood, Dr. Ramos and Dike visited the ranch and they went over it together. The testimony of Dike at pages 260, 261 and 262 of the Transcript not only shows that the agent of Miss Garwood, Dr. Ramos, was shown the entire ranch but that Miss Garwood likewise was shown the entire ranch.

Again at page seven of plaintiff's reply brief, her counsel tries to make it appear that defendants permitted her to leave the ranch under a misconception as to the true boundaries. She was certainly told times enough that the river was the western boundary to remove any question of misconception from the minds of the defendants. Counsel has tried to explain the "green line" part of the plaintiff's testimony by saying it was the tops of the trees on the far side of the levee. We wonder what part of the record he examined for this statement. In the complaint of plaintiff (Trans. page 6) she avers that Morris Scheiber pointed to the levee and told her that it was the boundary. In plaintiff's opening brief

her counsel asserts that the levee was pointed out to her as the line. We again call the attention of the Court to the testimony of plaintiff on this point, found at page 169 of the Transcript. It is as follows:

Q. Now, what conversation did you have with any one of the Scheiber men, the Scheiber Bros.?

A. Well, I had no idea of buying the ranch, I was trying to entertain them, and I said, "Where is this land?" and they pointed at the levee and they said "along that green line"—

Q. Do you remember which one of the brothers that was? A. I think it was Morris, the little one. Right along that green line to the white house. And I said "what green line?" and they made it more explicit and they said "Down that fence to those trees and across those trees, from the lower fence up to that grove." That is the only description I ever heard of the property in my life.

Q. What did he indicate when he said "along that green line?"

A. The levee. Q. He pointed to the levee?

A. He pointed to the levee, to the white house, which was a stable.

Q. Is that the only description which he gave you? A. That is the only description I ever had of the land.

Now, counsel for plaintiff, came forward with an explanation of the "green line," and from his own imagination and not from the record affirms that it was the tops of the trees on the far side of the levee. He has not explained nor can he ex-

plain to the advantage of his client her statement that she was told the boundary went down that fence to those trees and *across* those trees from the *lower fence* up to that grove. The lower fence, without any doubt, was the fence on the south side of the ranch as the river runs southerly. Counsel states, and evidently wishes this Court to take his statement as a fact to be considered in the case, that the trees referred to by plaintiff were located at the easterly side of the ranch. There is no evidence before the Court showing that there are trees at the east side of the ranch. Defendants were pointing toward the levee when they made the boundary "more explicit," and there was no evidence showing that a levee existed on the east side of the ranch. Counsel's explanation of the damaging admission of his client does not explain.

Again on page 8 of counsel's reply brief he wishes this Court to understand that the invitation extended to Miss Garwood to walk up on the levee was for the purpose of enabling her to see the country—some enchanting view, probably. He forgot the testimony of Dike, one of the witnesses for plaintiff, found at page 262 of the Transcript, which was as follows:

Int. No. 11n. Did you have any conversation with Miss Garwood on any of these visits to the ranch, if such visits were made, about the timber between the levee and the river and if so what was that conversation? A. I did. As we were just inside the levee I invited Miss Garwood to step on top of the levee that I might show her the timber land between the levee and the river, but she remarked that she could see it from the

machine and that she did not care to climb up the side of the levee.

Int. No. 11o. In any of the visits to the ranch with Miss Garwood, did you go or drive near the levee, and if so for what distance? A. We drove along the foot of the levee I think each time we visited the ranch for almost the entire width of the west end of the ranch.

Int. No. 11p. When you visited the ranch with Miss Garwood, if you did so visit it, from what point did you approach it and what course did you follow after reaching it? A. Sometimes we would enter the ranch from the east side, other times from the northwest corner at the foot of the levee and from this point we would continue either along the roads leading through the ranch or through the fields, both of which courses were taken frequently.

Int. No. 11q. In any of these visits to the ranch made by you and Miss Garwood, if such visits were made, did you point out to her the boundaries of the ranch and if so what did you mention as the boundaries? A. We did point out the boundaries and mentioned certain fences which constituted the southeast and north boundaries and the river bank representing the west boundary.

Plaintiff endeavors to make it appear that the reason of her refusal to go up on the levee was because of a sore ankle, although the Scheiber boys said she walked about the buildings and looked at the stock. Even if her ankle was sore she was informed by the invitation of Dike that there was timber land over the levee and every

opportunity was given her to see it or to make inquiries concerning it. Over and over again she was told that the river was one of the boundaries of the ranch, and if she did not have interest enough herself to ascertain how far away it was, certainly no duty devolved upon defendants to give her the exact measurements. One thing is evident, nothing was concealed and no deceit was practiced.

At page ten of the reply brief, plaintiff's counsel tries to make it appear that when Dike said he pointed out the boundaries and used the term "river bank" he meant the levee. This is another imagination of counsel. Counsel makes the further statement, not gathered from the evidence, however, that there is no bank to the actual edge of the water. The surveyor, Von Geldern, found banks from 12 to 14 feet high with the river three feet above low water. Counsel refers to the photograph exhibits. We have looked at them several times but we are unable to see that they prove anything different than what was brought out by oral testimony. The one where water is shown is a picture of a "swimming pool in the river," (see page 133 of Trans.).

Again at page eleven of plaintiff's reply brief, counsel again makes the assertion that plaintiff never knew that the tract extended to the west side of the levee. She was told many times that it did and there was no doubt but that she knew it. Why did she ask if there was any market for wood? There was no evidence that there was any timber on the east side of the levee.

We have already covered the question of the

valuation of this ranch at the time it was purchased by plaintiff in our first reply brief and it is unnecessary to discuss it further here. Evidently, as some of the witnesses stated, there was a great change in the market value of land in that vicinity after the reclamation district was formed. It will be observed by the Court that at the trial plaintiff made no attempt, in her case in chief, to show that the land was not worth what she paid for it. She based her contention that the land was sold to her by the acre and because every acre of the 600 was not worth \$125 she was damaged by the difference between that sum and what it was worth, it making no difference if 300 acres was worth \$300 per acre. It was only in rebuttal that she endeavored to show that the land was worth less than \$75,000, and objection was made by defendants to all testimony so offered on valuation. This testimony was taken before a Commissioner and, of course, our objections have never received a ruling. We presume that the trial court, concluding that this evidence should have been offered by her in her case in chief, disregarded the testimony when it was put in rebuttal. However, if such was not the case, the most that can be said on this point is that there was a conflict in the testimony and the judgment should not be disturbed.

At page 14 of the reply brief of counsel for plaintiff, he attempts to state the reason why the matters contained in the amendment to the complaint were not embodied in the several complaints filed by plaintiff in the different State courts in which she commenced actions. We don't know where he obtained the idea of "local preju-

dice.” It is a statement of counsel not warranted by any evidence in the case. Notwithstanding the attempted explanation of counsel, we still do not understand why the alleged facts embodied in the amendment were not pleaded in the other suits or in the original complaint in this action. These alleged facts were as well known to plaintiff when she commenced her action in rescission as they were when she filed her amendment and we are unable to see what “local prejudice” had to do with them.

At the bottom of page 14 of the reply brief of plaintiff we find the following statement:

“However, after the trial court allowed the defendants to put in testimony of witnesses that the land in its entirety was worth all that plaintiff paid for it, we filed with the Clerk of the District Court an offer in writing to the effect that in the event of a judgment for the plaintiff the defendants could take back the land in lieu of paying the judgment. It should be remembered that the plaintiff, before commencing her action in the State Court, had offered the land back to the defendants, and the defendants refused to take back the land. The written refusal of defendants to rescind is in evidence among the exhibits in this case.”

Counsel has gone entirely outside of the record in making the above statement. The record does not even refer to it in any place. Evidently it was made for some purpose, and the only reason for making it must have been for the purpose of effect upon this Court. Under the circumstances we feel at liberty to quote the full offer referred

to by counsel as contained in the transcript of the testimony of the trial. It may be found in Volume Six, page 398 of the Reporter's Transcript and is as follows:

Mr. Macomber: If your Honor please, while we are waiting for the witness to come in, the witness Silva testified yesterday that that land outside was worth \$250 an acre with an expenditure of \$60 an acre for clearing. Now, I have got here a deed from the plaintiff to the Scheibers, which I am going to leave with the clerk, to all that land, all the land outside the levee, if judgment should be rendered in this case in favor of the plaintiff for which she prays in full and it is paid within 60 days after judgment is entered, I instruct the clerk to deliver this deed from the plaintiff to the defendant, of all the land on the outside of the levee.

Mr. Miller: How much will the plaintiff take for the land now?

Mr. Macomber: We will sell the land today for \$75,000, after she has paid the \$21,000 on it.

Mr. Miller: You are sure you will take \$75,000 for the ranch as it stands today?

Mr. Macomber: Yes.

Mr. Hewitt: I am sorry you did not make the offer yesterday. I do not think there would have been any necessity to pursue this case any further, if that is the case.

Mr. Macomber: Of course, that has nothing to do with the finishing of the case.

The Court: If you can settle it, certainly it

would relieve the court of a great deal of trouble.

Mr. Hewitt: If the offer had been made yesterday, the cash would have been turned over.

The Court: Of course, that is something the court has nothing to do with at all, except that if you settle the case it relieves the court of a great deal of trouble.

Mr. Miller: Does that mean settlement of the whole thing?

Mr. Macomber: That has nothing to do with this case. The gentleman testified yesterday he was willing to give \$75,000 for the ranch would certainly be not concerned with any discussion between these parties in this court; he said he would give \$75,000 for this ranch; if he will do that, let him come through with his money.

Mr. Hewitt: Do you mean \$75,000 clear of encumbrance?

Mr. Macomber: \$75,000 as it is now. We will discuss this thing after court adjourns.

Mr. Hewitt: I would like, as long as counsel has made the statement, to have the matter presented so that the court may understand what his offer is. Do you mean \$75,000—

Mr. Macomber: We will discuss it after court adjourns, we will take it up; I think that will be more appropriate than making the courtroom a real estate office

Mr. Hewitt: I would like to know whether you make the offer in court to sell that land for \$75,000 free of encumbrance as it now stands?

Mr. Macomber: If your Honor please, I would like to take this matter up with Mr. Hewitt after the court adjourns.

Mr. Hewitt: Then I presume your offer is withdrawn for the present?

Mr. Macomber: We will take the matter up after court adjourns and if this gentleman wants to pay \$75,000 for this place as it is now, he is on.

Mr. Hewitt: I understand counsel to say that the offer is made subject to his right to recover whatever he is entitled to in this action; that the offer has nothing whatever to do with his right to prosecute this to judgment.

The Court: The offer will be ignored by the court entirely.

It is true that the plaintiff offered the land back to the defendants. She did this according to the record on March 11, 1912, some four and one-half months after she took possession of the property. The agreement to purchase set forth in the answer included the personal property on the ranch as well as the ranch, and she bought and took possession of both. In her offer to return the ranch she did not include the personal property and it is not surprising that the defendants refused to accept her offer.

No findings were made by the trial court in this action, as it was not requested to make findings. In the absence of findings the judgment of the trial court must be approved unless there was apparent error committed.

In case a decision has been rendered by a trial

court in cases where the evidence is conflicting, such decision is binding and conclusive.

“The conclusion of a trial judge on a question of fact, based on evidence taken before him, is entitled to great weight and will not be reversed unless there is a decided preponderance of evidence against it.”

*Pugh v. Snodgrass*, 126 C. C. A. 251

“Findings of the trial judge on conflicting evidence will not be disturbed on appeal unless overborne by the clear weight of the evidence as disclosed by the record.”

*Carey v. Donohoe*, 126 C. C. A. 254.

“Where an action at law is tried to the court and a jury is waived, the court’s general finding stands as the verdict of the jury and may not be reviewed unless the lack of evidence to sustain the finding has been suggested by a ruling thereon or on a motion for judgment, or some motion to present to the court the issue of law so involved before the close of the trial.”

*Pennsylvania Casualty Co. v. Whiteway et al.*  
127 C. C. A. 332.

“A verdict based on conflicting evidence will not be set aside on writ of error, as against the weight of evidence on an issue properly submitted to the jury.”

*American Mfg. Co. v. Moslanka*, 121 C. C. A. 589.

“The decisions of questions of fact upon the weight of conflicting evidence in the trial of an action at law without a jury are not reviewable in the national courts.”

*Busch et al. v. Stromberg-Carlson Tel. Co.*  
133 C. C. A. 244.

“Where an action is tried to the court without a jury, the court’s finding, whether general or special, performs the same office as the verdict of a jury.”

*Seep v. Ferris-Haggarty Copper Mining Co.*  
120 C. C. A. 191.

“In an action at law tried to the court, findings on facts are conclusive on appeal.”

*Los Angeles Gas & Elec. Co. v. Western Gas Const.* 124 C. C. A. 75.

“Where an action in the federal court is tried by the judge his findings of fact are conclusive in the appellate court unless there is no evidence to support them.”

*Washington & Canonsburg Ry. Co. v. Murray*, 128 C. C. A. 112.

In this case there was abundant evidence to support the decision of the trial court. The evidence of plaintiff on every material issue was controverted by the evidence for the defendants, yet notwithstanding the law as laid down in the foregoing decisions, plaintiff asks this Court to set aside the judgment, because, as she affirms, the decision is unsupported by the evidence.

Evidently the trial judge concluded that the ranch was sold en masse and it was worth all the plaintiff paid for it. True, some of the land was of but little value, but a large portion of the place was worth from \$250 to \$300 per acre according to the testimony. Plaintiff was not damaged to any extent. She could have disposed of the land at the same price she paid for it immediately after she bought it.

In plaintiff’s case in chief no attempt was made

by her to prove the value of the good land. It would have been impossible for the trial court to pronounce judgment in her favor for any amount on the evidence offered by her. Our motion for a non-suit which is shown at page 279 of the transcript should have been granted because of the fact that plaintiff had shown no damage.

It was granted in the personal property suit which was consolidated and tried with this one (See page 284 of Trans.).

Counsel for plaintiff in his reply brief still adheres to his claim that Dr. Ramos, the agent for plaintiff, was bribed. For what was he bribed? She obtained full value for her money and it was immaterial to the defendants whether she took the place or not. On this point we are content to rest the case on the argument made in our first reply brief (See page 62 and following).

Finally, as stated by us in our oral argument, plaintiff is seeking to obtain a ranch valued at \$75,000 for some \$43,000, and when the trial court refused to assist her she came to this Court upon a conflict of evidence and upon an unjust claim and seeks to have the decision set aside.

We again affirm that the judgment should be approved.

A. H. HEWITT,  
*Attorney for Defendants in Error.*

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*Personal service of the within brief is hereby  
admitted this ..... day of March, 1917.*

LLOYD MACOMBER,  
*Attorney for Plaintiff in Error.*

No. 2924.

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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT. 5

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ISABELLE GARWOOD,	}
<i>Plaintiff in Error,</i>	
VS.	
JOSEPH SCHEIBER and MORRIS SCHEIBER and JOHN SCHEIBER, <i>Defendants in Error.</i>	

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REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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LLOYD MACOMBER,  
Attorney for Plaintiff in Error.

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*Filed this.....day of March, A. D. 1917.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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Rincon Pub. Co., 639 Stevenson St., S. F.

Filed

MAR 15 1917

F. D. Monckton,  
Clerk.



No. 2924.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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ISABELLE GARWOOD,

*Plaintiff in Error,*

VS.

JOSEPH SCHEIBER and MORRIS  
SCHEIBER and JOHN SCHEIBER,

*Defendants in Error.*

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## REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Counsel argues that the sale was in gross. In our first brief, under the heading "Argument on Proposition that Sale was by the Acre and Not in Gross," it is clearly shown that the presumption is always against a sale in gross, and that this presumption can be overcome only by the strongest and clearest proof. The only thing in the record which defendants can use to make the argument that the sale was in gross is the testimony of the defendants where they claim that they told the plaintiff that "the deed calls for 600 acres more or less." That testimony is denied by the plaintiff. But assume it to be true, can they hide behind such a statement when they positively knew that there were only 450 acres of usable land to the tract, and they

knew that the plaintiff was going away with the impression that she was getting 600 acres of good land? By the testimony of Jones on page 86 of the Transcript, "450.365 acres is the net amount of land that can be used for agricultural purposes. This fact is nowhere denied. Defendants themselves do not claim that plaintiff received any more than 450 acres of usable land. By the testimony of Wessing, page 311, and Joseph Scheiber on page 397, all land outside of the levee is useless for any agricultural purpose. By the testimony of Joseph Scheiber, on page 394, the defendants knew that this large percentage of land had been lost, and that the tract no longer contained the 600 acres which the "old deed called for." By the testimony of Morris Scheiber, on page 363, they bought the tract for \$27,000.00; 450 goes into 27,000 just 60 times. 450 acres of usable land at \$60.00 an acre. By the testimony of Joseph Scheiber, on pages 394 and 395, and also by the testimony of Morris Scheiber on page 359, defendants knew that plaintiff was ignorant of the fact that there was about 90 acres of useless land outside the levee, and was ignorant of the fact that there was 70 acres actually under the Feather River. The land was at all times represented to the plaintiff by the agents as being 600 acres of alfalfa land—level—sub-irrigated—and *free from overflow*. By the law as cited in our first brief, the defendants are charged with those statements made by the agents; and, under these facts, the defendants, if they told plaintiff, as they say, that "the deed calls for 600 acres more or less," deliberately allowed plain-

tiff to go away with a wrong understanding of the condition and quantity of the land. The plaintiff was relying, as she had a right to rely, upon the representations of the agents; and she can not be charged with any fault; and this is true even though we forget that she was a person of no experience, and also forget that her confidential agent was bribed. By the law as cited in our first brief, the defendants themselves should have called all parties together and asked them just what representations had been made, and they should have then explained fully to the plaintiff the exact condition of the land. After aiding and abetting the wrong of the agents, and deliberately and knowingly allowing the plaintiff to go away with the wrong idea which they knew that she had, will they be allowed to avoid the consequences of their wrong by calling this a contract of hazard, and saying that the plaintiff took the land on a gamble? Of course it makes no difference one way or the other, but we are of the opinion that the agents were entirely ignorant of the quantity of land outside the levee. The data which they inserted in their printed circular they certainly got from the defendants, and they would certainly have no reason to print anything different from what the defendants gave them. Yet in spite of these facts the defendants would try to avoid liability by saying that they never authorized the representations which the agents made. We submit that it is too plain for argument that the defendants themselves are the wrongdoers, and their moral liability is just as great as their legal liability.

Defendants contend that it would be unrighteous to allow the plaintiff to keep this land "worth \$75,000.00," and have damages besides. The defendants paid \$27,000.00 for the tract, which is exactly \$60.00 an acre for the 450 acres of usable land. Although they had been on the land for many years before that time, the defendants did not buy the land until the year 1899. Prior to 1899, the defendants rented the farm from year to year. In 1899 they contracted to buy it for \$27,000.00—paying \$1,000.00 down, and the balance in installments of \$500.00 a year. By the testimony of defendant's witnesses, Wessing, on page 314, Thompson, on page 329, and Zimmerman, on page 335, there was no change in land values in that neighborhood during the interval that elapsed between the time that the defendants bought the land and the time they sold it.

That the human element in this case is very strong for the plaintiff is at once apparent. But it would be even more so if the court could read all the testimony in respect to the various sales of land in that immediate neighborhood, and see just how the prices compared with the sale price of the land involved.

On page 80 of his brief, counsel has inadvertently misstated the testimony of Brown. If the court will read Brown's testimony on page 99 of the transcript it will be seen that he testified that the land "was put up to her and talked to her as \$125.00 an acre". This testimony is direct and positive. Now, if the court will look at the testimony of Brown, commencing with the 6th line from the bottom on page 101, it

will see that the defendants themselves told him that they wanted \$125.00 an acre for their land; but that he didn't know whether the written contract which they gave the California Colonization Company used the words \$125.00 an acre, or \$75,000.00 for the land. The witness then goes on to state that his best recollection was that the contract of the *Scheibers* given to the *agents* said \$125.00 an acre, but that it might have said \$75,000.00—he would not swear to it. That carries us over to page 102 of the transcript, and farther along on that page Brown states that he read the “option” or “contract”, and it is perfectly clear that he is talking about the paper that was signed by the Scheiber Brothers authorizing the California Colonization Company to sell the land. He is not talking about the verbal representations that were made to the purchaser.

Counsel continues to argue that the purchaser actually received 600 acres. On page 81 of his brief, counsel states that we must base our conclusions on the survey made by H. H. Jones. He is mistaken. We know that there is an actual shortage of sixty acres by the positive and undisputed testimony of Mulvany, on pages 146 and 148. He testified that “during the past 25 years the river has worked south and covered about 70 acres or more of the land of this particular property”. Conceding that the tract originally contained 610 acres, that would leave just 540 acres. Defendant's witness Wessing, on page 311, testified that in 1892 the levee following the bend in the river marked “old Channel” was abandoned, and that they

then ran the levee straight down, so that all the land in the hollow of the bend was abandoned to the swamp. (See map on page 205 of first brief, or page 435 of transcript). By the natural tendency of a stream to straighten its course, the levee on the curve immediately beneath the words "old Channel" was quickly washed away, and the river thereafter spread over that wing-like strip lying to the west of the northwest quarter of Section 13. As we stated in the oral argument, however, we do not believe that the court will draw any distinction between land lying actually beneath the channel of the river and the adjacent swamp land which is conceded to be of no value. Morally, there can be no difference between valueless land and no land.

On page 45 of his brief, counsel states that "they took her agent and confidential adviser over the entire premises and showed him everything". There is no such testimony in the record; and there is absolutely nothing in the record, any place, to justify this statement. Even if it were true that they actually did show Ramos everything it would make no difference, in view of the fact that he was corruptly given money for helping to induce the plaintiff to buy.

On page 81 of his brief, counsel makes another very bad mistake when he says that "plaintiff never sought to have the price per acre reduced, but sought to have the price of the ranch as a whole reduced". On page 176 of the Transcript plaintiff testifies:

"A. Well, yes, I told them they ought to give it to me for \$100.00 an acre because it was wholesale, and they said they could not."

On pages 8, 9, 10, and 11 of his brief, counsel laboriously tries to twist plaintiff's testimony into an argument that defendants told her that the land went over the levee, contending that that circumstance would be sufficient to excuse them for allowing the purchaser to go away with the misconception which they knew she had in reference to the character of the land. Plaintiff testifies on page 206 that defendants told her that the boundary line of the ranch "went right along the green line". The green line was simply the bank of dense green foliage formed by the tree tops on the far side of the levee. Viewed from a distance, it looks like a green bank, or green line. Now, if they said that green line was the boundary, how could they in the same breath say that the land went over on the other side of that green line? Plaintiff's testimony on this point is not as clear as it might be; but if the court will look at page 206 it will see that what the plaintiff intended to convey was that they told her that the boundary of the ranch went along the levee to a point near a white building, and thence to the right along a fence to some trees, and from those trees over to "the grove". At another place in the record her testimony reads "across those trees", instead of "across *from* those trees". When she used the word "*trees*", the plaintiff was referring to some trees at the easterly end of the tract, and not to the trees behind the levee. All we ask in this regard is that the court read the testimony of the plaintiff on page 206 as well as that portion to which the quotations of counsel are confined, and it will be at once apparent

that the plaintiff's testimony conforms to the allegations of the complaint, and that there is nothing in her testimony that can be made the basis of an argument that they told her that the land extended over on to the other side of the levee.

Another point which the defendants have seized upon to excuse them for not explaining the true character of the land to the plaintiff is the testimony of the witness Dike, on page 262, to the effect that he asked the plaintiff if she would like to walk up to the top of the levee. We would like to ask the question at this point "What is there in that testimony, or in any testimony in the record, to show that it was stated to plaintiff that the land on the far side of the levee belonged to the tract they were trying to sell her? Let us now see what the plaintiff herself says about their asking her to go up on the levee. On page 207 the plaintiff testifies: "Mr. Dike asked, in passing, would I walk up and look around the country, and I said no, I wanted to go to the ranch." Was there anything in the invitation of Dike to go up on the levee which can excuse the defendants for not telling the purchaser that 25 per cent of their land was worthless? Everything in the record leads us to the belief that the agents themselves were entirely ignorant of the large percentage of land outside of the levee. Dike's invitation to go upon the levee was simply a suggestion to the plaintiff that she could get a good view of the country from the elevated position on the levee. Dike's invitation to the plaintiff to go upon the levee can not possibly be contorted into an effort on his part to

show plaintiff any objectionable feature of the land he was at the time trying to sell her. Does it stand to reason, that if Dike knew about a particularly bad portion or feature of the land, he would lead the prospective purchaser to that particular point upon their first advent to the land? But suppose that Dike, in asking the plaintiff if she would like to step up onto the levee, really did ask her to step up there so that she could first see a particularly bad feature of the land—didn't the plaintiff refuse to climb up the levee, and didn't she state to him that her ankle was too sore to climb that steep embankment? If Dike's purpose in asking plaintiff onto the levee had been to make her familiar with the worthless condition of any portion of the land, would he not, and should he not, have then and there immediately stated to her that twenty-five per cent of the 600 acres which they had told her about could not possibly be used for any agricultural purpose? Dike took the plaintiff to the land on Thursday, September 21st. The following Saturday night, September 23d, they held a protracted conference in Sacramento in reference to the prospective sale. At that meeting there were present the three agents, Crane, Dike and Brown, and Ramos and the plaintiff. With the exception of Ramos, who was dead, every one of the parties at that meeting testified at the trial; and each one testified that it was there represented to the plaintiff that the tract was 600 acres of first class alfalfa land. If the plaintiff had been advised of any worthless land in the tract, or any land which she would have reason to believe

was not good, would the circumstance not have been discussed at that meeting? At that meeting there was not a thing said in reference to any land not being as good as some of the other land, and nothing said about any shortage, and nothing said about any land outside the levee. On page 99 Brown says: "There was nothing said about some of the land not being as good as some of the rest of the land." On page 261 Dike says: "We pointed the boundary line by fences, levee and river boundary." In as much as the river could not be seen from the east side of the levee, and as the plaintiff thought that the river was close up against the other side of the levee, they must have given her the levee as the northwestern boundary. On page 263 Dike says that, in pointing out the boundaries to the plaintiff, they mentioned the river bank as the west boundary. There can be no question that by the word "bank" he meant the high embankment formed by the levee. The Court can take judicial notice that a levee at such a place is a high embankment anywhere from ten to twenty feet in elevation, and in some places higher. The actual water's edge could not be seen from the east side of the levee, and moreover there is no bank to the actual edge of the river. An inspection of the photograph exhibits will show the water's edge as having a very close resemblance to a sand or gravel beach. In this connection we must again refer to the testimony of Morris Scheiber on page 359 of the transcript, viz.: "I says, 'Over to the old Feather River.' Q. Do you know whether she understood at the time or not that the river was up against the levee, or

whether it was away back from the levee? A. I don't know. Q. You don't know? A. No; she did not say anything." By the testimony of the plaintiff on pages 206 and 207, she thought that the river lay immediately behind the levee. We think it is as plain as A B C that when they had the woman there at the land, both the agents and the owners gave her the levee as one of the boundaries of the tract.

While we think about it we want to call attention to two points in the testimony of Brown. On page 138 Brown testifies that the plaintiff told them that she had no experience in reference to land. On pages 139 and 140 he testifies that the land was represented to her as being sub-irrigated.

The stubborn fact remains that plaintiff never knew that the tract extended to the west side of the levee. It was the duty of the defendants to make her understand, not simply that there was land on the other side of the levee, but that 25% of the so-called 600 acres was absolutely useless. The purchaser was entirely without experience, and they all knew it. Moreover, at that time, the plaintiff had no idea of buying that land; as Ramos had, of course, not yet started to work on her. At that time Ramos had never before seen the land himself, and of course he could not consistently urge her to buy anything that he had never himself seen. When we recall that she had not intended to invest more than \$6000.00 in the beginning, we readily perceive that she did not begin to think seriously about buying this large tract until after Ramos had got her off alone and commenced to

tell her why she should buy the land. Under all the facts of this case, the situation is identically the same as though the plaintiff had never seen the land before signing to buy it.

We believe that the action of the court in this case, as it is in all cases, will be influenced largely by the purely moral status of the case. We have shown the most serious and palpable errors in the ruling of the trial court; nevertheless, if this court should believe that the plaintiff in error, after her discovery of the true character of the land, was really offered all that she had paid for the land, and that she refused to take it, the court would be very loath to interfere with the judgment, errors of law notwithstanding. Silva, a personal friend of the defendants (and, by the way, all of defendants' valuation witnesses were their personal friends), comes into court and says that he has farmed this particular land, and that he is thoroughly familiar with that land and the neighboring land, and with land values in that neighborhood. Silva states that he is worth the money, and that he offered the plaintiff \$75,000.00 for the land. Plaintiff, on page 222, vehemently denies that Silva ever made any such offer. Which of the two witnesses is testifying falsely? Let us look at the map on page 205 of the first brief, or on 435 of the transcript. We notice the land of W. H. Saylor, immediately southwest of the good land of the Garwood tract. Defendants' witness John Borgman, on page 325, says: "The Saylor land is *not quite* as good as the best land on the Schreiber ranch." Now virtually all of the witnesses on both sides say

that the good land on the Garwood place is twice as valuable as the poor land at the lower end of the tract. From this we see that the 128 acres of the Saylor farm is, on the average, much better land than the 450 acres of usable land on the Garwood tract. On page 404 Saylor himself says that he bought that comparatively small tract of 128 acres in 1909 or 1910 for 100 dollars an acre, and that the land had been on the market a long time at that price. We thus see that \$100.00 an acre would have been a high price for the 450 acres of the Scheiber land. Now here comes Silva, a man of means and business sagacity and thrift, and thorough acquaintance with land conditions and values in that district, and swears under oath that he would have paid \$125.00 an acre for that 450 acres of usable land of the Scheibers, and along with that he would have given \$125.00 an acre for the seventy acres under the Feather River, and also \$125.00 an acre for the ninety acres of admittedly worthless swamp land. We submit that, in the light of these facts, Silva's testimony is too ridiculous for serious consideration. The reasoning in reference to the Saylor land applies also to the Borgman land. The same reasoning applies to the land marked "M. Meiss, Drescher and J. B. Thompson" (formerly the Valley place). (See testimony of defendants' witness Wessing.) The same reasoning applies to the land marked Gilmore at the bottom of the map. These statements may all be verified by the testimony of the defendants' valuation witnesses. The same reasoning applies to the Redfield farm (marked

"Scheiber Bros."), paralleling the good land of the Garwood tract on the northeast. (See testimony of Dave Redfield and Mulvany, and also defendants' valuation witnesses.)

Counsel states that we did not use our own map because of its inaccuracy. This is not true. We have used his map because it shows the surrounding farms, and our map does not.

Counsel asks the question, "Why was not the substance of the amendment to the complaint embodied in the complaint as it was originally filed?" The answer to that question is simply that it was because of a misconception on the part of plaintiff's counsel in the true theory of the case. Upon her discovery of the shortage in the land, plaintiff commenced an action for rescission and damages in the State Court in Sutter County; but being fearful of local prejudice she thereafter withdrew that action, and thereafter commenced her action in the United States Court. At the time plaintiff's present counsel commenced the action in the Federal Court, so long a time had elapsed since the sale of the land that he did not think a rescission obtainable, and for that reason framed his action simply for an abatement in the purchase price. However, after the trial court allowed the defendants to put in testimony of witnesses that the land in its entirety was worth all that plaintiff paid for it, we filed with the Clerk of the District Court an offer in writing to the effect that in the event of a judgment for the plaintiff the defendants could take back the land in lieu of paying the judgment. It should be remem-

bered that the plaintiff, before commencing her action in the State Court, had offered the land back to the defendants, and the defendants refused to take back the land. The written refusal of defendants to rescind is in evidence among the exhibits in this case.

Respectfully submitted,

LLOYD MACOMBER,  
Attorney for Plaintiff in Error.



No. 2924.

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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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ISABELLE GARWOOD,  
*Plaintiff in Error,*

v.

JOSEPH SCHEIBER and MORRIS  
SCHEIBER and JOHN SCHEIBER,  
*Defendants in Error.*

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## PETITION FOR REHEARING

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LLOYD MACOMBER,  
*Attorney for Plaintiff in Error and Petitioner.*

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FILED

OCT 30 1917

F. D. MONCKTON,  
CLERK.





If A sells to B a tract of land for \$125 per acre, and B gives to A \$75,000 upon the representation of A that there are 600 acres to the tract, and it turns out that there are only 450 acres,—thereafter, in an action brought by B to recover from A the money paid for the 150 acres never received, will the law allow A, as a defense, to put in opinion testimony to the effect that the 450 acres conveyed were worth \$200 an acre instead of \$125?

This Court (for the Fourth Circuit) has said: "The agreement to pay \$60,000 was a single and entire undertaking for the whole property purchased; and appellant should not now be heard to say that, although there may have been fraud as charged by the appellees in the sale of the timber, the entire property was worth more than he sold the same for." *Kell vs. Trenchard*, 142 Fed. 20, 73 C. C. A. 202.

The Supreme Court of Iowa has said: "The twelfth instruction directs the jury that the price agreed upon is to be taken as the value of the 84 acres of land. This is correct. When parties, by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them." *Howes vs. Axtell*, 74 Iowa, 400, 37 N. W. 974.

No. 2924.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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ISABELLE GARWOOD,

*Plaintiff,*

v.

JOSEPH SCHEIBER and MORRIS  
SCHEIBER and JOHN SCHEIBER,

*Defendants.*

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## PETITION FOR REHEARING.

Plaintiff in error respectfully petitions the court for a rehearing in the above entitled cause.

In the judgment of counsel the court has misapprehended the facts in this case. We believe that the facts have been misapprehended in two vital phases, and that from this misconception of the facts there has resulted a misapplication of law. In this case the complaint alleges and the record shows that the vendors agreed to sell to the vendee 600 acres of land, protected from overflow, for \$125 an acre. The vendee paid the vendors \$75,000 with that understanding; but got only 450

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NOTE.—Figures in parentheses refer to pages of transcript. All italics are ours.

acres of land. Relief is sought in this case upon the theory laid down in *Smith vs. Bowles*, 132 U. S. 125, 33 L. ed. 279, that is, that the plaintiff's measure of damage is the difference between the value of that which she parted with and the value of that which she received. The complaint is not framed upon any theory of damages for the loss of any bargain; but merely asks for compensation. The first phase in which the facts have been misapprehended is as to the value of the land which the plaintiff received under the contract. The second phase is as to who is responsible for the misapprehension as to the true character and quantity of the land which the plaintiff admittedly had at the time they sold her the land. The misapplication of law complained of is that the opinion sanctions the action of the trial court in disregarding the price per acre fixed by the agreement of the parties, and permitting the defendants to put in opinion testimony to the effect that the 450 acres actually conveyed were worth more than \$125 per acre, and were worth the \$75,000 which the vendee gave them for the represented 600 acres.

## PLAINTIFF DID NOT GET FULL VALUE.

The opinion states: "The more reliable testimony substantiates the view that the property at the time of the purchase was reasonably worth all the plaintiff gave for it." \* \* \* "So that there is here, without considering the land beyond the levee, more than full value, according to what Miss Garwood paid for the ranch." From these statements it is plain that

the court has decided the case on the theory that the 450 acres which the plaintiff actually received was worth the \$75,000 which she parted with, regardless of representations or agreements. That the court decided the case upon that theory is plain for the further reason that, aside from the testimony referred to by the language just quoted from the opinion, the record presents no evidence upon which a judgment for the defendants can be based. I believe that the court is of the impression that the plaintiff is trying to retain the land, and also take from the defendants money as damages to which she is not morally entitled. The plaintiff did not get full value for her money. Her injury is more than thirty thousand dollars. And with all the earnestness that I can command I will say that the record in this case shows that if ever a suit was commenced in a court of justice in which the plaintiff was entitled to relief this is one.

To the end of proving the assertion just made, we will respectfully invite the court's attention to the map herein at page 4a. This map is a photograph of defendants' Exhibit J, and it is a very good map of the land involved and the surrounding farms. This map is included in the Transcript, and is also appended to plaintiff's brief. For the convenience of the court, I have marked with arabic numerals in red ink all the tracts in close proximity to the land involved, concerning which there is any definite and positive testimony in the record in respect to sales. At this point we will respectfully call the court's attention to the fact that there was no change in land values

in that neighborhood during the twelve years immediately preceding the sale to the plaintiff. On page 314 the witness Wessing testifies: "From 1899 and 1900 up to 1911 and 1912 the values ran along pretty steady, about the same. There was not much change." To the same effect, see the uncontradicted testimony of three other witnesses at pages 426, 329 and 330 and 335. Tracts 2, 4 and 7 immediately adjoin the land involved, and the remaining tracts, 1, 5 and 7, are all within less than three-quarters of a mile from the land involved. All of the tracts are of the same general character of land. (425, 317, 415, 409, 410, 411.) Tract designated No. 1 is the northerlymost tract on the map, and is marked as belonging to M. Meis *et al.* As appears from the map, this tract is about 180 acres. It was sold at auction "just a year before Miss Garwood bought the Scheiber place," and the "highest bid was \$69 an acre" (315). Tract No. 2 is the farm which adjoins the land involved on the northeast. It is marked Scheiber Bros., but all through the testimony it is referred to as the "Redfield Farm." The Redfield farm was sold by D. R. Redfield to Schwartz, and thereafter Schwartz sold to Scheiber Bros, Redfield having retained for himself the small piece shown at the upper end of the tract. On page 411 D. R. Redfield testifies: "A. I sold 140 acres for \$5000 to Schwartz." By the testimony of Redfield on page 412, and also by the testimony of Wessing on page 319, 20 of the 140 acres are outside the levee, and therefore not to be counted. We see, then, 120 acres sold for \$5000, which is just \$41.66 per acre. On





page 409 Redfield testifies that he sold it "About ten years ago." The date of the trial when he testified was in July, 1915, which would make the date of the sale 1905, about 6 years prior to the sale to the plaintiff. The Redfield Farm is identically the same as the best portion of the land sold to plaintiff. (409, 410, 411, 425.) Tract No. 3 is the land involved herein. It was bought by defendants in 1899 (339) for \$27,000, which is just \$60 per acre for the 450 acres of usable land which there is to the farm. (363.) Tract No. 4 is the land of W. H. Saylor, adjoining the Garwood land on the southwest. By the testimony of the owner Saylor, the tract contains 125 acres and was bought by him in 1909 or 1910 (399), that is, a year or two before the sale to plaintiff. On page 404 Saylor testifies that he paid \$100 an acre for the tract. By the testimony of Mulvany (425) the Saylor place is better land than the Garwood place. By the testimony of Wessing on page 317 the Saylor land and the Garwood land are of the same character. Tract No. 5 is a small piece of about forty acres just south of the Saylor land. It was sold to Borgman in 1905 (323) for \$131 an acre (316). Tract No. 6 is the southerlymost tract on the map, and is a little over a half mile from the southerly corner of the Garwood land. It consists of 850 acres, and was bought by Gillmore in 1911, or 1912, for \$26,000 (316, 317), which is slightly less than \$31 per acre. Tract No. 7 is the tract designated "John Schwall" at the southeasterly corner of the Garwood land. On page 318 the witness Wessing testifies: "There was 180 acres

of land just east of the Garwood place belonging to John Schwall, which was sold to some Japs for \$85 an acre. Then after paying a part of the purchase price, they defaulted on the balance and let the land revert to the sellers." It must be remembered that the neighboring tracts, with but one exception, were all comparatively small, much smaller than the Garwood tract. Large tracts of land, when sold in their entirety, always sell for less per acre than small tracts. One reason for that is the wholesale principle. The main reason is, however, that for large tracts the number of purchasers is much more limited. There are fewer men with money enough to buy the large tracts. The court can draw its own conclusions from the sale figures quoted; but, notwithstanding their overwhelming significance, the defendants' value witnesses (all neighboring farmers and close friends of the defendants) testified that the 450 acres of the Garwood land, lying to the east of the levee was worth \$75,000.

At this point we will ask if it might not be pertinent to suggest that we disregard the opinions of all the value witnesses and take a glance at the agreement of the parties? Would that be a proper and legal way to ascertain the value of the land? Have we any authority to support the suggestion? I will quote from just one single case from among the many cited in the brief of plaintiff under the heading on page 19.

In *Harrell vs. Hill*, the court says:

"In response to this we have to say that we can alone look to the agreement of the parties to determine the value of the premises in question. By their contract, solemnly entered into, they have

computed the tract supposed to contain one hundred and eighty acres at the gross price of one thousand five hundred dollars, or at the average value of eight dollars and thirty-three and one-third cents per acre. The evidence of other persons as to their estimate of the value of the land must be regarded as foreign to the subject and not pertinent to the inquiry, the true rule in analogous cases being that the price paid must be regarded as the only evidence of the value."

*Harrell vs. Hill*, 19 Ark. 102, 68 Am. Dec. 212-218.

I have worked on the case of *Garwood vs. Scheiber* for more than four years, and on this particular point I have gone through the books as thoroughly as the ingenious devices of modern law book makers will permit, and I can conscientiously say that I do not believe that, aside from the decision of this court in the case at bar, not a case can be found in conflict with the doctrine just quoted. The question which now logically presents itself to us is: "What was the agreement between the parties?" The deed mentions the land as 600 acres more or less (84, 85). In the brief of plaintiff, commencing with the heading on page 77, will be found case after case holding that such language in the written instrument constitutes a sale by the acre. And the court will there also find case after case holding that where the language of the written contract is ambiguous a sale by the acre is to be presumed unless the contrary is clearly established by parol evidence. All the cases are to the effect that the presumptions are against sales in gross. The plaintiff testified (172, 166, 167, 176) that the land was

talked to her and put up to her and sold to her at \$125 per acre. At no place in the record is she contradicted. She is corroborated by all three of the defendants' agents—Crane, Dike and Brown. (See Plaintiff's Brief, p. 38 *et seq.*) On page 254 of the record the agent Dike testifies: "We did effect a sale to Miss Garwood of a ranch belonging to Scheiber Brothers which we represented to contain 600 acres, three hundred of which was in alfalfa and the balance in pasture land." And on page 257 Dike admits that the land was represented as being 600 acres and as being all level. On page 261 Dike testifies that the arrangements were that they were to sell the land for \$125 an acre. On pages 107 and 108 the agent Crane testifies that the land was represented to Miss Garwood as being first-class alfalfa land and that it was put up to her at "\$125 an acre." On pages 98 and 99 the agent Brown testifies that the land was represented to the plaintiff as being 600 acres of the finest alfalfa land, and that it was sold to her at \$125 an acre. And the land was represented to her as being free from overflow. (See pages 13 and 14 of this petition.)

When plaintiff's testimony is uncontradicted, and is corroborated by the uncontradicted testimony of three of the defendants' agents, two of whom are palpably hostile, what more convincing proof could be desired? In order to shorten this petition as much as possible we will eliminate altogether from the discussion the point as to the inferior land at the south end of the tract.

By the undisputed testimony of the engineer Jones

(86) there is just 450 acres of land to the tract inside the levee, that is, to the southeast of the levee. Whatever land there is outside the levee is valueless. The defendants themselves expressly admit that on page 397, and so does their witness Wessing on pages 310 and 311. Complete data as to character of the land lying outside the levee will be found in plaintiff's brief, on page 49 *et seq.* We find, then, that the only thing of value which the plaintiff received under the contract is the 450 acre tract southeast of the levee. By the terms of the agreement between the parties, what is the value of the 450 acre tract of land which she actually received? When we multiply \$125 by 450 we find that it is just \$56,250. In no event can the value of the 450 acres of usable land be considered as exceeding that amount.

#### PLAINTIFF WAS MISLED BY MISREPRESENTATIONS INTO BELIEVING THAT SHE WAS TO GET 600 ACRES OF PROTECTED LAND.

On page 9 the opinion states that the defendants themselves represented to Miss Garwood "the conditions as they really existed". This is a most serious misapprehension of the facts. Counsel for defendants does not contend that plaintiff knew the actual conditions of the land. His argument is that, from certain things that were said to her, she *ought to have known that there were not 600 acres of land*. When plaintiff bought the land she did so under the belief that she was getting 600 acres of first-class alfalfa land pro-

tected from overflow by levee. By the uncontradicted testimony of four witnesses (see quotations of testimony on page 8 of this petition), the price and value of the land agreed upon was \$125 an acre, and the money she paid was just 600 times \$125. By the undisputed testimony of the engineer Jones (86), there are but 450 acres inside the levee, that is to the eastward of the levee. The plaintiff did not know of this shortage until several months after the sale (186, 187). The question now to be discussed is: "Who is responsible for the misapprehension of the plaintiff as to the character and quantity of the land?" Counsel for the defendants does not deny that she did have this misapprehension. Nowhere does he argue that plaintiff knew of the shortage at the time of the sale. A glance at the first twenty pages of defendants' brief will show his argument to be that the fact that she had this misapprehension is purely her own fault, and no fault of the defendants. The plaintiff's testimony is to the effect that they, the defendants and their agents, led her to believe that the levee was the western boundary of the land. The defendants make the claim that they did not tell her that the levee was the boundary, but that it was the river that they mentioned. At no place in the record is there any evidence that they made any statement to plaintiff in respect to the quantity of the land outside the levee; and there is no evidence that they told her anything about how far the river was from the levee. They admit that they never said anything to plaintiff in that respect. On page 394 Joseph Scheiber testifies:

"Q. You know there used to be more land to that ranch than there was when you sold it?

"A. Yes.

"Q. That is true?

"A. That is true.

"Q. Do you know whether or not this woman knew about that land being gone when she bought the place?

"A. I don't know whether she knew that, or not.

"Q. You did not point out to her across the river where there was any land?

"A. I pointed the lines.

"Q. She never went upon the levee?

"A. Not that I seen.

"Q. You were out driving with her, were you?

"A. Yes.

"Q. You never drove her over the levee, did you?

"A. No. I did not drive over the levee.

"Q. Why didn't you drive her over the levee?

"A. You could not drive over there, too rough, too steep.

"Q. Wasn't there a road up on the levee there?

"A. We used to have a road there; we had been hauling wood out, but that was not a road to go on with a lady like Miss Garwood with a buggy."

Then on page 395 Joseph Scheiber testifies:

"Q. Why didn't you show her how the land was just outside the old levee, Mr. Scheiber?

"A. She never asked me to go over there.

"Q. She never asked you, so you didn't take her?

"A. I never thought of it; she did not ask me to go.

"Q. You did not tell her how much land there was over the levee?

"A. No.

"Q. You didn't say how much?

"A. No."

On pages 364 and 365 Morris Scheiber testifies:

"I told her that the land goes clear out to the river, over across the levee out to the old river there, and I pointed it out to her.

"Q. Did you tell her how much land there was out there?

"A. No.

"Q. Did she ask you?

"A. No."

Now on page 359 defendant Morris Scheiber testifies:

"Q. Did you tell her any land went across the river?

"A. No, not across the river, I says, 'Over to the old Feather River.'

"Q. Do you know whether she understood at the time or not that the river was up against the levee or whether it was away back from the levee?

"A. I don't know.

"Q. You don't know?

"A. No; she did not say anything."

The point that counsel makes (see first twenty pages of his brief) is that there telling her that the land went to the river was sufficient, and that it was for the plaintiff herself to know just how far the river was from the levee, and that if she formed a wrong conclusion in that regard it was her own lookout, and no fault of the defendants. Counsel says on page 11 of his brief: "It may be that plaintiff thought the river was closer than it was, and that she did reach

a wrong conclusion." From the testimony of Dike at the top of page 261, where he says: "We pointed the boundary by levee and river boundary," it is plain that they did give her the levee as the western boundary. But for the purpose of this argument we will concede that the defendants did use the word river instead of the word levee. The point I make is that after assuring her that there were 600 acres, and taking her money on that basis, they can not now be heard to say that she should have known that twenty-five per cent of the tract was outside the levee and useless for any agricultural purpose. Even had they said "to the river," they would not have been telling the truth; because some of the land was beneath the river, and some at least on the far side.

We will respectfully call the court's attention to the fact that just prior to her visit to the land the defendants' agents gave plaintiff a circular containing representations concerning the tract. Speaking of this circular or book, the plaintiff, on page 191, testifies: "I believed implicitly every word that they said and what they said was exactly what they showed me in their book, and I believed everything otherwise I would not have bought the place." By the case of *Connecticut Mutual Life Ins. Co. vs. Carson*, 186 Mo. 221, 172 S. W. 69, quoted from at length in plaintiff's brief at page 159 *et seq.*, the circular which they gave the plaintiff is competent, relevant and material evidence. A photograph of the page of the circular with the item describing this land can be seen at page 433 of the transcript. The remarks in the circular con-

cerning this land are as follows: "600 acres in Sutter County. River Bottom land, east bank of the Feather River, near Nicholas. Is protected from overflow by levee. Under cultivation, mostly alfalfa, there being 300 acres in alfalfa, balance adapted to growth of alfalfa," etc., etc. "The soil is deep, rich sediment loam, and lays practically level. No irrigation is required for alfalfa." We ask the court to particularly note the sentence "*Is protected from overflow by levee.*" From this it is clear that the 600 acres they were to sell her would be found on the east side of the levee. It was represented to her that the land was protected from overflow, and assuredly any territory outside the levee would not be "protected from overflow." The land she was interested in was that which lay eastward from the levee and which lay "practically level." Assuredly any land that might lay between the levee and the actual edge of the water could not be level. We respectfully invite the court's attention to the testimony of the plaintiff commencing at the foot of page 171 of the record, where she says (speaking of Mr. Dike):

"A. He said, 'The Natomas land overflows, and the Natomas people would not sell their land under \$250.00 an acre, they have got to stop that overflow, too,' and he said, 'you will get your land for \$125 an acre and it is already stopped.'"

Nowhere is that testimony contradicted. We desire to ask this question: "In view of the representations which were made, can counsel's contention be legally, equitably, or morally just?" From the evi-

dence we see that the circular and the verbal representations of the three agents of the defendants assured plaintiff that she was to have 600 acres of land which lay practically level and was protected from overflow by levee. There is absolutely nothing in the record to show that the plaintiff had any warning whatever that any portion of the 600 acres of finest quality of alfalfa land lay on the outside of that levee. The defendants claim that some remarks were made in respect to what the land outside the levee was good for. They claim that the plaintiff asked them what that land outside the levee was good for, and they told her that it was "good for wood." Now the 600 acres that she was paying \$125 an acre for was all good for alfalfa—the finest alfalfa land. If the land outside the levee was good only for wood how could any of those 600 hundred acres be out there. Under the conditions which appear so plain, how can the plaintiff be accused of having received notice or warning sufficient to put her upon notice that there was not fully 600 acres of good land. Assume that they told her that there was some land on the outside of the levee lying between the levee and the river; for that circumstance to be of any benefit to them as a defense they must have accompanied it with a full explanation that that land which lay outside the levee was a part of the 600 acres which she had been told about. After being assured that there were 600 acres of alfalfa land "protected from overflow by levee," and laying "practically level," if she were told that there was some land lying between the levee and the

river wouldn't she suppose, and wouldn't she have a right to suppose, that it was abandoned swamp land (which it actually is)? Wouldn't anyone (much less a woman with absolutely no experience in those matters) naturally under those conditions give that land but a momentary place in his attention? We would think of it as abandoned land, state or government land, or no man's land. And even if she were expressly told that it belonged to the ranch, if she had been assured that there were 600 acres of first-class alfalfa land, protected by the levee, and had believed what had been told her, would she not think of that land outside the levee as being additional to the 600 acres of protected land lying to the eastward of the levee? Having believed and relied upon the representations as to the quantity and quality would not such a conclusion be natural and proper? And just now we must remember that on the outside bank of the levee lays a dense growth of rather tall trees, the tops of which form a dense wall of green which projects above the levee. Even if you stand on the levee, you have no way of telling whether the river is a hundred feet away from you or a mile away. Two or three acres lying outside the levee with that growth or vegetation on it would be amply sufficient to make the same appearance from the road; but it is a long way from two or three acres to 150 acres.

Conceding that the defendants really did tell plaintiff that the land at that end of the tract "went to the river," and assuming that plaintiff supposed, as she actually did suppose, that the river ran close along the

other side of the levee, does that in any respect lessen the defendants' moral and legal obligation to make good to the plaintiff, after agreeing to give her a tract of protected alfalfa land for \$125 an acre, and taking from the plaintiff 600 times \$125 upon her belief in their own representations that there were 600 acres of protected land to the tract? That defendants' agents assured plaintiff that she was going to have 600 acres of protected land, and that the plaintiff "implicitly" believed those representations and assurances is nowhere denied. Counsel now rests on the contention that, assuming those facts to be true, nevertheless from certain things that were said to her she should have inferred, or reasoned, that those assurances were false and fraudulent and not to be relied upon, and that because she failed to so reason, and failed to so infer, she has no comeback. Is counsel's contention logical? Is it just? Logically, is he not in pretty much the same position as the man who tries to lift himself over the fence by his boot straps?

Thus far we have assumed it to be true that the defendants, when they mentioned the western boundary to the plaintiff, used the word "river," instead of the word "levee." On page 263 the witness Dike testifies: "We did point out the boundaries, and mentioned certain fences which constituted the southeast and north boundaries and the river bank represented the west boundary." That by the "river bank" he meant the levee is clear when we read his testimony on page 261, where he says "*levee and river boundary.*"

Counsel has devoted a large portion of the first twenty pages of his brief to a very laborious argument attempting to prove that the plaintiff's own testimony shows that defendants told her that the land went over the trees on the far side of the levee. That he is mistaken will be perfectly clear to the court if the court will read the testimony of the plaintiff commencing with the first question on page 206 and continuing to the bottom of page 207. The trees tops on the far side of the levee formed a dense bank or line of green, and her testimony is to the effect that they told her that the western boundary line ran *along* that green line, not across it or on the far side of it. At a previous point in her testimony when she says "*across those trees*" she is referring to trees at the other end of the tract. She never referred to the levee as trees, but she speaks of it as a green line; and her testimony is that they said "*along* that green line."

In the lower half of page 9 of the typewritten opinion the court has inadvertently misstated the facts. The opinion reads: "She was told by one of the Scheibers at least that a portion of the land lay over beyond the levee, and was asked to go upon the levee and see for herself." Nowhere in the record do any of the Scheibers testify that they told her, or said to her, that "a portion of the land lay over beyond the levee." This is clear by the testimony of Morris Scheiber, on page 359 of the record, where he says:

"Q. Did you tell her any land went across the river?

"A. No, not across the river, I says, 'Over to the old Feather River.'

"Q. Do you know whether she understood at the time or not that the river was up against the levee or whether it was away back from the levee?

"A. I don't know.

"Q. You don't know?

"A. No; she did not say anything."

Whatever reference was made to any land outside the levee it was never even hinted to the vendee that it was a part of the 600 acres of protected land that she was to get.

Now, as to her being invited to go upon the levee. That invitation was not extended to her by any of the Scheibers. Dike was the one that mentioned going upon the levee. On page 262 of the record the witness Dike states that he asked Miss Garwood if she would like to climb up the levee; but he made no reference to any land outside the levee as being any part of the 600 acres of protected land which she was to receive, or in fact as any part of the ranch.

By the numerous cases cited in plaintiff's brief under the heading on page 115 the defendants are liable for each and every act and representation of the agents. The principal cases that I now call to mind, quoted from at length in the portion of plaintiff's brief, are the following:

*Connecticut Mutual Life Ins. Co. vs. Carson*,  
(Mo., 1915) 172 S. W. 69;  
*Althorf vs. Wolf*, 22 N. Y. 365;  
*Busch vs. Wilcox*, 82 Mich. 336, 21 Am. St.  
Rep. 563;  
*Bank of Calif. vs. Western Union Tel. Co.*, 52  
Cal. 291.

A glance at these cases will show that the defendants, when they adopted the contract and took the purchaser brought to them by the three agents, should have questioned the vendee in regard to what representations had been made by the agents. In order to avoid liability, they should have advised plaintiff fully in regard to the actual conditions of the land. It is nowhere contended that defendants did not fully know just what the true conditions were. They make the claim that they never had the land surveyed; but it must be remembered that they farmed the tract as yearly tenants for many years before they signed the contract to buy, and they certainly knew every inch of the ground before they bought. If they never had it surveyed themselves, it was because it was unnecessary to have it surveyed. The Pacific Mutual Life Insurance Company, from whom they bought it no doubt had it surveyed while they were tenants, and gave them a guaranteed statement of the acreage. The defendants themselves knew at the time that there were just 450 acres of protected land. There can be no possible doubt of this when we consider the testimony. At the foot of page 363 defendant Morris Scheiber testifies: "Q. When you bought that land of the Pacific Mutual, you paid \$26,000 for it? A. We paid \$27,000." Now, if we divide \$27,000 by 450 we will find that 450 goes into \$27,000 just 60 times. What does that signify? It means that they bought the land as 450 acres, and that they paid just \$60 an acre for those 450 acres.

Now, having that knowledge of the land they knew

that the plaintiff was going away with a misapprehension that she was getting 600 acres of good protected land. Had they been on the square they would have told the plaintiff frankly and honestly just what the conditions were, and they would have said to her: "You must not go away with the impression, Miss Garwood, that you will have 600 acres of protected land; the old description calls for 600 acres, but there are only 450 acres." "One hundred and fifty acres are outside the levee, and it cannot be farmed because it is subject to overflow, and is nothing but swamp and sand." Did they do this? What do they say they told her? They claim that they told her that the deed calls for 600 acres more or less, and that they sold it as they bought it. They claim that they always told her "600 acres more or less"; and they keep repeating the words "more or less" with a monotonous and mechanical repetition which strongly inclines us to believe that they never heard the words "more or less" until after this action was commenced. Miss Garwood denies that they ever used the words more or less; but we are not arguing that point. The point we make is that 600 acres, more or less, means approximately 600 acres and not 450 acres; and that when they knew that she was laboring under the belief, superinduced by the representations of their own agents, that there were 600 acres of land, they should have then and there set her right on that point.

A substantial point of argument is this: By the uncontradicted testimony of four witnesses (see quotations of testimony on page 8 of this petition) it is con-

clusively and irrevocably established that the land was sold to the vendee at the agreed price of \$125 per acre. The vendors took from the vendee 600 times \$125, to-wit, \$75,000, and that circumstance in itself will permit of no conclusion other than that that sum of money was paid to the vendors by the vendee upon the mutual agreement that there were 600 acres to the tract. Under circumstances such as these, does not the law clothe the transaction with an implied *assumpsit* upon the part of the vendors to refund to the vendee \$125 for each acre that the land falls short of the number of acres paid for?

Reduced to its lowest terms the whole proposition is simply this: By the terms of the agreement the plaintiff was to receive 600 acres of level land protected from overflow by levee. The vendee obtained that understanding from the vendors' agents, and the vendors themselves well knew that she had that understanding at the time of the sale; and while having that knowledge, the vendors failed to do a single one of the things which they should have done to disabuse her mind of the false impression which they knew she was laboring under. Under these circumstances the plaintiff is entitled to the 600 acres of protected first-class alfalfa land, which the agreement called for, or its equivalent, regardless of what land lay on the outside of the levee.

By the cases which we have just cited the words of the agents are put into the mouths of the principals, and the law will not now allow the defendants to say: "You have foolishly placed too much reliance upon

the statements which we ourselves have made to you." The legal and technical liability of the defendants is complete, and their moral duty to return to the plaintiff the money which they took from her without giving her anything in return therefor is identically as great.

### THE POINT OF LAW INVOLVED.

The point of law involved is as to the admission of testimony. The court below allowed the defendants to put in opinion testimony to the effect that the 450 acres of land actually conveyed were worth \$75,000. The court even allowed a witness for the defendants to testify that he had offered Miss Garwood what she had paid for the ranch. Miss Garwood most vehemently denies that Silva ever made any such offer. The error as to the admission of the testimony as to the offer by Silva is argued under Exception No. 3, on page 33, of the plaintiff's brief, and we can add nothing to what has been there said.

If the defendants represented to plaintiff that the land consisted of 600 acres of first-class alfalfa land, protected by levee, and the understanding was that she was to have the land at the price of \$125 an acre, and the plaintiff, in full belief in the representations, paid to the defendants \$75,000, will the defendants, as a defense, be permitted to put in opinion testimony to the effect that the 450 acres which the plaintiff actually received are worth more than \$125 an acre? Would it be good law to allow such testimony? The decision of this court, as the opinion now stands is

authority to the effect that such testimony is proper. In plaintiff's brief under the heading "Argument on the Errors of Law," on page 19, will be found many cases holding that such evidence is no defense whatever. I have looked through the books as carefully as I can, and have run the point down to the last month, and I have not found a single case expressing a doctrine contrary to that of the cases hereinafter cited. And the court will look in vain through defendant's brief for such a case. The defendants simply say that "plaintiff's damage is the difference between the value of that which she parted with and that which she received." There can be no argument on that point. That is settled by the two cases of *Smith vs. Bolles*, 132 U. S. 125, 33 L. ed. 279, and *Sigafus vs. Porter*, 179 U. S. 116, 44 L. ed. 113. The only point of difference between us is as to the method by which we are to ascertain the value of that which plaintiff received. Defendants contend that the contract of the parties should be disregarded, and a new and appraised value put on the land by opinion witnesses. My contention is that the contract of the parties affords the only means of fixing the value of that which the plaintiff received. The complaint in this case is framed upon a certain and well defined theory. The theory is that, by the agreement of the parties, the defendants were to sell to the plaintiff a certain number of acres of a certain character of land, at a certain specified price per acre, to-wit, 600 acres of level river-bottom land, protected from overflow, at \$125 per acre. Plaintiff received under the contract

only 450 acres and she has brought action on the contract to recover for the deficiency. The theory of damage asked for by the complaint is that plaintiff is entitled to the difference between the value of that which she parted with and that which she actually received. That is the correct measure of damage according to the two famous cases of *Smith vs. Bolles* and *Sigafus vs. Porter*. The value of that which plaintiff parted with it \$75,000. What is the value of that which she received? By all the cases, as well as by logic, the value of the land which the plaintiff received can be nothing other than the contract price per acre multiplied by the exact number of acres which she received. She received but 450 acres of land. Conceding the 450 acres to be as represented, it is worth, according to the terms of the contract,  $450 \times \$125$ , which is just \$56,250. \$56,250, then, is the value of that which the plaintiff received under the transaction, and when we subtract \$56,250 from \$75,000 we get \$18,750, which is plaintiff's damage by reason of the shortage at the upper end of the tract. By that measure of damage she is simply given compensation, nothing more. It simply reimburses the plaintiff at the agreed price per acre for the number of acres missing or worthless. Does that measure of damage work substantial justice? We can conceive of no argument to the contrary. A review of the law as to the measure of damages in cases of this kind will show that there are two different lines of doctrine. Many of the states have held to the rule that the measure of the plaintiff's damage in cases of this kind is the difference between

the appraised value of the property as it actually is and the value that it would have were it as it was represented to be. This measure of damages gives the vendee damages for the loss of his bargain. To illustrate: Suppose that as in this case, the agreement between the vendor and the vendee was to the effect that the vendor was to sell to the vendee 600 acres of a certain character of land at a certain price per acre, and it turned out that the tract was just 150 acres short of the 600 acres agreed upon. Were the complaint framed under the theory of law which allows damages for the loss of the bargain, it would allege the market value of the land considering its actual condition and also the market value it would have were it as it was represented to be. Thus, supposing that the complaint should allege that the market value of that character of land was \$1000 an acre, and there were 150 acres missing, the damage would be just \$150,000, no matter what price was paid for the land. If it were bought at the agreed price of \$125 per acre, then just \$75,000 was paid for it. And thus we see that the vendee's damage would be \$150,000, notwithstanding the fact that he had parted with but \$75,000, and notwithstanding the fact that he had admittedly already received \$450,000 worth of land in the transaction. The two famous cases *Smith vs. Bolles*, 132 U. S. 125, 33 L. ed. 279, and *Sigafus vs. Porter*, 179 U. S. 116, 44 L. ed. 113, have discarded that measure of damages so far as the federal practice is concerned, and they lay down the rule that all speculative profits are to be eliminated, and the damage obtained by

deducting the value of the property as it actually is from the amount which the purchaser parted with. We believe that the doctrine of *Smith vs. Bolles* and *Sigafus vs. Porter* is sound, and in this action the recovery is sought upon that theory, and the complaint was drawn and the proofs adduced upon that theory. The case of *Howes vs. Axtell*, 74 Iowa, 400, 37 N. W. 974, lays down the rule that in a suit for damages for shortage of land, the value of the land is to be obtained by multiplying the contract price per acre by the actual number of acres received. *Howes v. Axtell* is cited with approval by the United States Supreme Court in the case of *Sigafus vs. Porter*, 179 U. S. 123. Assume that a party bought what was represented to him to be 600 acres of a certain character of land at \$125 an acre, and the tract turned out to be 150 acres short. The vendee brings an action against the vendor and his action seeks to recover damages for the loss of his bargain. The complaint alleges that land of the character of that agreed upon is worth \$1000 per acre, and, as the tract is 150 acres short of the acreage agreed upon, he alleges his damage to be \$150,000, notwithstanding the fact that he has parted with but \$75,000, and notwithstanding the fact that he has confessedly already actually received \$450,000 worth of land. The court, in passing on the case, and applying the doctrine of *Howes vs. Axtell* and *Smith vs. Bolles* and *Sigafus vs. Porter*, would say to the plaintiff: "You cannot now be heard to say that that land is worth \$1000 an acre, because when you made the purchase you did so upon the agreed valuation of \$125

per acre. You are bound by your agreement." And by the same reasoning the court will make the same reply to vendors who would avoid liability for shortage by asserting that the acres actually conveyed are worth more than the price per acre agreed upon. *Howes vs. Axtell* says: "The law will not permit either party to dispute the value as settled by them." (74 Iowa, 400, 37 N. W. 974.) On page 11 of the typewritten copy, speaking of the admissibility of this testimony, the opinion reads: "If the sale were in gross—and this is what the defendants maintained—it was pertinent to substantiate its gross value." The fact must not be overlooked that if the sale were in gross the plaintiff would have no ground for recovery in any event, no matter what the value of the land—whether great or small. If the sale were found to be in gross, it would be so found because of a failure to prove some of the essential representations complained of. On the other hand, if the alleged representations are true, the sale cannot possibly be in gross. If any of the essential allegations in respect to the representations are not true, defendants are under no necessity of establishing value for the market value or appraised value is immaterial. Then again, if it is true that these representations were made, the market value or appraised value of the portions of land uncomplained of is immaterial, for the same reason, viz., the value has been already fixed by the agreement of the parties. The only questions for the trial court to examine are these: "Is it true that the land was represented to be 600 acres of level river bottom

land protected from overflow by levee? Is it true that the price and value as settled by the parties was \$125 per acre? Is it true that plaintiff paid to defendants 600 times \$125, or \$75,000, with the understanding that there were 600 acres? Is it true that the land is deficient in the respects alleged? Should those questions be not all answered in the affirmative, the plaintiff cannot recover, no matter what the appraised value of the land. But if they are answered in the affirmative plaintiff is entitled to redress no matter what anyone might opine the land to be worth. The law will not force the purchaser to be satisfied with a fraction of the article purchased and paid for merely because the court is of the opinion that the whole would really be worth more than the contract price.

We thus see that in the case at bar the questions at issue are purely those as to the representations, and that under no theory of the case is opinion evidence of the market value of the land uncomplained of material. The mischief which would result from such a rule of law as is here complained of will be at once apparent. Just as in the case at bar, all the elements of the case might be established, and the plaintiff be entitled to recover, yet, from the testimony of experts, the court might conceive the idea that the land as it actually is, is really worth, by reasonable market value, all that the vendee parted with in the transaction, and, as a result, the vendee would be deprived of his right to have what he bought and paid for. The court would be making a new contract for him.

In *Harrell vs. Hill* the court says:

“Evidence was introduced and the fact conclusively established, that the tract of land in question, though less than one hundred and eighty acres, was and still is worth from twenty-five to thirty dollars per acre, and it is insisted by the counsel for appellee that it would be inequitable and unjust to permit the appellant to retain the quantity really existing and allow here compensation for the deficiency in proportion of the gross price agreed to be paid for the supposed quantity—one hundred and eighty acres. In response to this, we have to say that we can alone look to the agreement of the parties to determine the value of the premises in question. By their contract, solemnly entered into, they have computed the tract supposed to contain one hundred and eighty acres at the gross price of one thousand five hundred dollars, or at the average value of eight dollars and thirty-three and one-third cents per acre. The evidence of other persons as to their estimate of the value of the land must be regarded as foreign to the subject and not pertinent to the inquiry, the true rule in analogous cases being that the price paid must be regarded as the only evidence of the value.”

*Harrell vs. Hill*, 19 Ark. 102, 68 Am. Dec. 212.

In the case of *Howes vs. Axtell* the court says:

“The twelfth instruction directs the jury that the price agreed upon is to be taken as the value of the 84 acres of land. This is correct. When parties by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them. The instruction directs that the value of the land as it is found, *considering its real quantity*, is to be deducted from the value as settled by the agreement of the

parties, and the difference will be plaintiff's damages. This rule is just, *as it gives plaintiff compensation*, and nothing more. See *Hallam v. Todhunter*, 24 Iowa, 167." (All Italics ours.)

*Howes vs. Axtell*, 74 Iowa, 400 (1888), 37 N. W. 974.

The United States Circuit Court of Appeals for the fourth circuit, in the case of *Kell vs. Trenchard*, says:

"The agreement to pay \$60,000 was a single and entire undertaking for the whole property purchased; and appellant should not now be heard to say that, although there may have been fraud as charged by the appellees in the sale of the timber, the entire property was worth more than he sold the same for. This action involves solely the question of whether the appellees, by reason of the fraud practiced by the appellant and his agents, are entitled to relief because of the disparity in the quality of the timber sold. They made no complaint as to the other property; but aver that as to the timber purchased there was a warranty that there would be at least 35,000,000 feet, and that the purchase of the timber was the moving consideration that caused them to acquire the property of the appellant, it being their purpose to go extensively into the lumber business; that the appellant and his agent, Vaughn, procured the contract from them by false representation as to the quantity of timber bought; and that they in consequence received 8,232,100 feet, instead of 35,000,000 purchased by them."

*Kell vs. Trenchard*, 142 Fed. 20, 73 C. C. A. 202.

The case of *Kell vs. Trenchard* arose in North Carolina. It was decided by the United States Cir-

cuit Court of Appeals for the Fourth Circuit in 1905. The opinion quotes with approval the cases of *Smith vs. Bolles* and *Sigafus vs. Potter* to the point that the measure of damages in such cases excludes all speculative losses. The opinion states that the measure of damages in such cases is the difference in the value between that which the purchaser parted with and that which he actually received. That is our position exactly; and *the actual value of that which the plaintiff in this case received is the contract price per acre multiplied by the exact number of acres received*. Were it good law to disregard the terms of the contract, and take a new and appraised value of the portion of the property uncomplained of, it would certainly have been permitted in *Kell vs. Trenchard*.

By *Kell vs. Trenchard* alone it is clear that under no circumstances, nor for any purpose, is that testimony admissible. And yet the opinion in this case holds that it *is* admissible. And the opinion says that by that testimony it is shown the the 450 acres of usable land which the plaintiff actually received is worth the \$75,000 which she parted with, and that she is therefore not entitled to relief. The highly prejudicial character of the testimony is obvious.

Land values are awfully uncertain quantities, and it would be a strange and most singular rule of law which would permit a party to solemnly contract in reference to the value of land, and thereafter go into court and request the court to ignore that agreement in order to relieve him from liability for false statements in reference to the quantity of the land.

The error which the record discloses is of the most serious and prejudicial character. Other than the testimony complained of, there is no evidence in the record to support the judgment for the defendants. The evidence shows the facts to be that the contract price per acre was \$125, and that the defendants took from the plaintiff 600 times \$125 with the understanding that there were 600 acres to the tract. By uncontradicted testimony it is shown that the land was represented to be free from overflow. It is admitted that there are only 450 acres to the tract, and that whatever land there is above that amount is subject to overflow to such an extent that it is valueless. We now respectfully ask: "Have we not established the elements of a case?" If these are the facts, why is not this plaintiff entitled to relief? She was not a person of great wealth to begin with, and the transaction has all but ruined her financially, and has changed the whole course of her life.

As I stated at the outset, I believe that the court has labored under the belief that the plaintiff has already received full value for her money, and that by this action she is unconscionably trying to relieve the defendants of money to which she is not righteously entitled. Impressions once formed are often hard to remove. I believe that I should at this time use every honest means within my power to disabuse the court's mind of that impression; and in this regard I will say that during the course of the trial, in the court below, after the defendants had made the boast that the land, as it was, was worth \$75,000, the plaintiff filed with

the clerk of the court below a stipulation and agreement in writing to the effect that, in the event of judgment for the plaintiff, the defendants could, in lieu of paying the judgment, take back the land, and return plaintiff her money, together with what she had been compelled to pay out for reclamation improvements. This offer is now on file in the court below, and the document bears the clerk's red ink number 53. It was filed Sept. 11th, 1915, while the cause was under submission, and is entitled "Stipulation as to Delivery of Deed." The question is now pertinent: "Would the plaintiff prosecute this expensive litigation, in the presence of a standing offer of that character, if she could get back the money expended by selling the property?"

The ends of justice can not be defeated by a reargument of the important questions here discussed. A reargument may rather prevent a miscarriage of justice.

Respectfully submitted,

LLOYD MACOMBER,  
*Attorney for Plaintiff in Error and Petitioner.*

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I hereby certify that in my judgment the foregoing petition is well founded, and that it is not interposed for delay.

LLOYD MACOMBER,  
*Attorney for Plaintiff in Error and Petitioner.*





